The Twelfth part of the

REPORTS

OF

Sr EDWARD COKE, Kt.

Of Divers Reſolutions and Judgments given upon ſolemn Arguments, and with great Deliberation and Conference with the Learned JUDGES in

Caſes of Law,

The moſt of them very Famous, being of the KINGS eſpecial Reference, from the

COUNCIL TABLE,

Concerning the *Prerogative*; As for the digging of Salt-peter, Forfeitures, Foreſts, Proclamations, &c. And the Juriſdictions of the Admiralty, Common Pleas, Star-chamber, High Commiſſion, Court of Wards, it Chancery, &c. And Expoſitions and Reſolutions concerning Authories, both Eccleſiaſtical and Civil, within this Realm.

ALSO

The Forms and Proceedings of Parliaments, both in *ENGLAND*, and *IRELAND*: With an Expoſition of *Poynings* LAW.

The Second Edition.

Non eſt leges condendi authoritas, ubi non eſt obediendi neceſſitas, & è converſo.

With Alphabetical Tables, wherein may be found the Principal Matters contained in this Book.

LONDON,

Printed by the Aſſigns of *Richard* and *Edward Atkins* Eſquires, for *Hen. Twyford* and *Tho. Baſſet*, and are to be ſold in *Vine-court* Middle Temple, and at the *George* in *Fleet-ſtreet*, near *Clifford's Inne*, 1677

FH
MVSEVM
BRITANNICVM

A TABLE OF THE SEVERAL CASES Contained in this BOOK

A.

Accessory, none in Treason, Petit Larceny, and trespas. 81
Admiralty. 77,79
Admiralty, no Court of Record. 103
Affidavits false. 128
Ashleys case. 90
Aurum Reginæ. 21

B.

Baker and Halls case. 99
Banks case. 61
Bedles and Beards case. 4
Bishops. 7
Buggary 36

C.

Capias utlegatum awarded by Iustices of Peace. 102
Chanceys case. 82
Chancellor and Register. 78
Chutes case. 115
Commissions. 30
Conspiracy. 23
Convocation. 72
Corvens case. 104
Countess of Shrewsburies case. 93
Crimes and Smiths case. 4
Crown. 100
Custom. 17
Customes, Subsidies, and Impositions. 32
Customes of *London*. 112

D.

Dignity, Prerogative. 111
Dungannons case. 120
Duresse per Goalar. 127

E.

Earl of Shrewsburies case. 105
Earl of Derbies case. 113
Earl of Northamptons case. 132
Estwicks case. 135
Emprinhghams case. 134

F.

Felons Goods. 121
First-fruits and Tenths. 45
Fishing. 88

Ford and Sheldons case. 1
Forfeitures by Treason. 6
Forrests. 22
Fullers case. 41

H.

HAbeas Corpus. 129
Habeas Corpus return and discharge. 47
Hayes case. 101
Haynes case. 112
Heresie. 56
Herseys case. 103
High Commission. 49,87
High Commissioners. 69
High Commissioners, if they have power to imprison. 19
Honours. 81
Hungates case. 121

I.

IUrisdiction of the Court of Common Pleas. 108
Jurisdiction Ecclesiastical. 111
Justice in *Wales* not but by Commission. 48

L.

LAndales case. 58
Libels. 35
Lord St. John, and Dean of *Glocesters* case. 3
Lord Abergavenies case. 69
Lord Vauxes case. 92

M.

MAnneys case. 101
Mansfields case. 123
Manslaughter. 87
Mouses case. 62

O.

OAth ex officio. 26
Oath before Justices. 130
Oldfields and Gerlins case. 71

P.

PArdon. 29
Parliament in *Ireland*. 108
Parliament formes and Orders. 114
Piracy. 73
Premunire. 37
Prerogative of the King in Salt-peter. 12
Priviledges of Priests. 99
Proclamations. 74
Procters case. 117
Prohibition. 58
Prohibitions *del Roy*. 63
Prohibition, Court Ecclesiastical. 65
Prohibition, none after the Writ *De excommunicato capiendo*. 76

R.

REservation. 36
Ropers case. 45

S.

SCarlets case. 98
Stanneries. 9
Shulters case. 89
Simony. 73, 100
Stockdales case. 86
Stray. 100

T.

TReason. 15

W.

WArcombe and Carrels case. 124
Wooton and Edwards case. 35
Writ *De heritico comburendo*. 92

Pasch.

Paſch. 4. *Jacobi* Regis.

Ford *and* Sheldon's *Caſe*.

IN an Information in the Exchequer Chamber for the King, againſt Thomas Ford Eſquire, Ralph Sheldon Eſquire, and divers others; The Caſe was thus.

Thomas Ford was before the Statute of 23. Eliz. a Recuſant, and for money lent to Sheldon, ſome before 23. Eliz. and ſome after, took a Recognizance in the names of ſome of the other Defendants, and took alſo a Grant of a Rent-charge to them in Fæ, with condition of Redemption by Deed indented: And the Recognizance was conditioned for performance of Covenants in the ſaid Indenture, and afterward the Statute of the 29. Eliz. was made, by which it was enacted, that if default of payment was made in any part of payment (viz.) of 20 l. for every month, &c. That then and ſo often the Queens Majeſty by proceſs out of the Exchequer may take, ſeiſe, and enjoy all the goods, and two parts, &c. And after the ſaid Act, and before the 29 year of the Raign of the late Quen, Ford lent divers other great ſums of money to Sheldon, and for aſſurance of it, took a Rent-charge by Deed indented, with condition of Redemption: And took alſo ſeveral Recognizances in the names of ſome of the other Defendants, for performance of Covenants, &c. as is aforeſaid: which Recognizances did amount in all to the ſum of 21000 l. all which were to the uſe of the ſaid Ford, and to be at his diſpoſition, and they were forfeited: And afterward, viz. 41 Eliz. Ford was convict of Recuſancy, and did not pay 20 l. per menſem, according to the Statute. And, if upon all this caſe the King ſhould have the benefit of theſe Recognizances, was the Queſtion.

And this caſe was debated by Council learned on both ſides in Court. And it was objected by the Council of Ford, that if the Recognizances had been acknowledged to Ford himſelf, they ſhould not be forfeited to the King, for the Statute ſpeaks only of Goods. And Debts are not included within the word (Goods). And therefore, if the King grant all the Goods which came to him by the Attainder of I. S. the Patentæ ſhall not have debts due to him, for that the Grant only extends to Goods in poſſeſſion and not to things in action. And this act is a penal Law, and ſhall not be extended by Equity.

2. It was objected that theſe Recognizances were acknowledged, to perform Covenants in an Indenture concerning a Rent-charge: And therefore ſavors of the Realty, and are not within the intention of the ſaid act, which ſpeaks only of Goods.

3. No fraud or Covin appears in the caſe; And then foraſmuch as no Act of Parliament extends to this caſe, it was ſaid, that the Common Law doth not give any benefit to the King: For at the Common Law, in far ſtronger caſe, if Ceſtuy que uſe had been attaint of Treaſon; this uſe foraſ-

much as it was but a truſt and confidence, of which the Law did not take notice, it was not forfeited to the King, and could not be granted: and if an Uſe ſhall not be forfeited, of which there ſhall be a Poſſeſſio fratris, &c. and which ſhall deſcend to the Heir, A multo fortiori, a meer truſt and confidence ſhall not be forfeited.

4. It was objected, that if the forfeiture in the caſe at the Bar accrues to the King, by the Statute of 29. Eliz. it ought to be by force of this word (Goods): But that ſhall not be without queſtion in this caſe. For Ford hath not any Goods, but only a meer truſt and confidence, which is nothing in conſideration of Law.

And the Court cannot adjudg that theſe Recognizances belong to the King by equity of the ſaid Statute, becauſe it is penal: Alſo one Recognizance was taken in the names of ſome of the other Defendants, before the Statute of the 29. Eliz. which gave the Forfeiture.

And for that reaſon, it cannot be imagined that it was to defeat the King of a Forfeiture, which then was not in Eſſe, but given afterwards.

As to the firſt objection, it was anſwered and reſolved by all the Barons, and by Popham chief Juſtice of England, and divers others of the Juſtices, with whom they conferred, that if the Recognizances had been acknowledged to the party himſelf, that they were given to the King without queſtion, for perſonal Actions are as well included within this word, Goods, in an Act of Parliament, as Goods in poſſeſſion. But inaſmuch as by the Law things in action cannot be granted over for that cauſe by general grant (things in action (which only he may grant by his Prerogative) without ſpecial words paſs not for what he can grant only by his Prerogative) can never paſs by general words. And it was affirmed, that ſo it had been reſolved before, that is to ſay, That Debts were forfeited to the King by the ſaid Act of the 29. Eliz. And where the Statute ſaith, Shall take, ſeiſe, and enjoy all the Goods, and two parts, &c. Although a Debt due to a Recuſant cannot be taken and ſeiſed, yet inaſmuch as there is another word, viz. Enjoy, the King may well enjoy the Debt; And by proceſs out of the Exchequer levy it, and ſo take and ſeiſe, refers to two parts of lands in poſſeſſion, and enjoy relates to Goods.

As to the ſecond objection, it was originally for the loan and forbearance of money. And as well the Recognizance as the Annuity were made for the ſecurity of the payment of the ſaid money: Alſo when the Recognizances are forfeited, they are but Chattels perſonal.

As to the third Objection, there was Covin apparent: for when he was a Recuſant continually after that Statute of the 23. Eliz. and for that chargeable to the King, for the forfeiture given by the ſame Act, it ſhall be intended that he took theſe Recognizances in the name of others, with an intent to prevent the King of levying of the forfeiture: And all the Recognizances which were taken in other mens names after the ſaid Act, ſhall be preſumed in Law to be ſo taken, to the intent to defeat the King of his Forfeiture: True it is, that an uſe or Truſt ſhall not be forfeited for Treaſon or other offence by the Common Law, becauſe it is not a thing of which the Common Law taketh any notice, for that Ceſtuy que uſe, hath neither Jus in re, nor Jus ad rem; but by the Common Law, when any act is done with an intent and purpoſe to defraud the King of his lawful duty, or forfeiture by the Common Law, or Act of Parliament, the King ſhall not be barred of his lawful Duty and Forfeiture, Per obliquum, which belongs to him by the Law, if the Act was made De directo.

And therefore if a man Out-lawed buy Goods in the name of others, the King ſhall have the Goods in the ſame manner, as if he had taken them directly in his own name: So if any Accountant to the King purchaſe

Lands

Lands in the names of others, the King ſhall ſeiſe thoſe lands for money due unto him. And this appears by the caſe of Walter Chirton. Trin. 24. Ed. 3. Rot. 4. in Scaccario, where the caſe was, that Walter de Chirton was indebted to the King, 1800 l. which he had received of the Kings Treaſure, and did purchaſe certain Lands with the Kings money; and by Covin had cauſed the Vendor to enfeoff his Friends in Fæ to defraud the King, and notwithſtanding took the Profits himſelf: and afterwards Walter Chirton was committed to the Fleet for the ſaid Debt. And all the matter was found by Inquiſition, and by Judgment the Land was ſeiſed into the Kings hands Quouſque; for in caſe of the King, an act done by Covin, Per obliquum, ſhall be equal to an act done De directo, to the party himſelf, For, Rex fallere non vult, falli autem non poteſt: See another Preſident, Trin. 24. Ed. 3. Rot. 11. Suis Regis, where one Thomas Favell was Collector of Tithes and Fiftæns, and was ſeiſed of certain Lands in Fæſimple, and having divers Goods and Chattels, Die intromiſſionis de collectione & levatione, of Tenths and Fiftæns Languidus in extremis alienavit tenementa ſua & bona & catalla diverſis perſonis, And died without Heir or Executor. In this caſe by the Prerogative of the King, Proceſs was made as well againſt the Ter-tenants, as againſt the Poſſeſſors of the Goods and Chattels, although they were not Executors, &c. Ad computandum pro collectione predicta, & ad reſpondendum & ſatisfaciendum inde Regi, &c. Et hoc per Cancellarium Anglice & Capitales Juſticiarios Anglice, & aliorum Juſticiariorum utriuſque Banci: quod nota bene.

As to the fourth Objection, Non refert, whether the duty do accrue to the King by the Common Law, or by Statute; but be it the one way or the other no Subterfuge that the party can uſe, can defeat or defraud the King: And although one of the Recognizances was taken before the Statute of 29. Eliz. yet that was to his uſe, and for that it is in the nature of a Chattel in him, and was taken in the names of others to prevent the Quæn of her Forfeiture, which ſhe might have by the act of 23. Eliz. And although Ford was not convict until 41. Eliz. that is not material, for at all times before that he was ſubject to a Forfeiture for his Recuſancy.

Paſch. 4. *Jac.*

In the Chancery, 27 *Junii*, 29 *Eliz. Inter Johannem Dominum* S. *John de Bletro querentem, & Decanum, & Capitalem Gloceſtrie Defendentes.*

Appropriation, Procedendo, denied in Chancery.

THe caſe was, that the Plaintiff brought a Quare Impedit in the Common Pleas againſt the Defendant, for the Church of Penmark, in the County of Glamorgan; which ſuit was ſtaid by Aid-prayer, and the Record was removed into the Chancery; upon which the Plaintiff moved for a Procedendo, and upon Oyer of Cauſe, before Sir Thomas Bromley Lord Chancellor, in the preſence of Sir Gilbert Gerrard Maſter of the Rolls, and Shute and Wyndham Juſtices, and Popham Attorney, and Egerton Solicitor of the Quæn, the Plaintiff ſhewed a Gift in Tail of the ſaid Advowſon made to his Anceſſor in the 18 R. 2. and a verdict for his Anceſſor in the 12 H. 8. and a Preſentation by his Grandfather to the ſaid Church, of a Clerk who was admitted, inſtituted, and inducted, with poſſeſſion for certain years, and divers other matters to prove the Title of the Plaintiff, yet for this, that the Defendant and thoſe from whom he claims, time

out of mind, had had the poſſeſſion of the Parſonage as Impropriate (ſaving interruption for ſome ſmall time.) And for this that it ſhall be a dangerous preſident to the Quæn and others, Owners of Impropriations, being able to maintain the Appropriations to be perfect in all points and circumſtances, which are requiſite to the making of an abſolute and compleat Impropriation, the Appropriations being made of ancient time.

It was reſolved by this Court of Chancery, by the advice of the Juſtices and Counſeil learned of the Quæn, that no Procedendo in loquela ſhould be granted.

Vide Ridley fol. 153,154. the beginning of Appropriations and of Annuities to be diſcharged of Tithes; It was after *Benedict* who was the Inſtitutor of Monks, &c. And note there the reaſon of Prayer being preferred before Preaching.

Vide 155. *ibid.* That the Saxon Kings appropriated eight Churches to the Monaſtery of *Croyland*, as appears by *Ingulphus* who was Abbot there.

3

Trin. 30. *Eliz.* In the Exchequer Chamber.

Inter Thomas Crimes & *alios Querentes*, & Henricum Smith *Defendentem.*

Endowment is preſumed when a Vicaridg hath long continued.

THe Caſe was ſuch; The Abbot of Sulby held the parſonage of Bulbenham in the County of Leiceſter appropriate, which as a Parſonage Impropriate came to King H.8. by diſſolution of Monaſteries, An. 31. H.8. who in the 37 year of his Reign, granted it in Fæ-farm; under which Grant the Plaintiff claimeth, the Defendant had obtained a preſentation of the Quæn, and to deſtroy the ſaid Impropriation did ſhew the Original Inſtrument of it, An. 22. Ed. 4. with condition, that a Vicaridg ſhould be competently endowed, & alledged that the ſaid Vicaridg was never endowed. And for that very cauſe the Impropriation was void, & in truth there was no inſtrument, nor direct proof of any endowment of the Vicaridg.

But for this that the ſaid Rectory was during all the time of the Impropriation ſuppoſed, reputed, and taken to be Appropriate, and by all that time a Vicar preſented, admitted, inſtituted, and inducted as a Vicar rightfully endowed, and paid his Firſt-fruits and Tenths:

It was reſolved by all the Court, that it ſhall be preſumed that the Vicaridg in reſpect of continuance was lawfully endowed, for that Omnia preſumuntur ſolenniter eſſe acta. And it ſhall be of dangerous preſident to examine the Originals of Impropriations of any Parſonages, and the endowments of Vicaridges, for that the Originals of them in time will periſh. And ſo it was decreed for the Plaintiff.

4

Hill. 4. Jac. Regis.

Inter William Bedle *Gen. Quer.* & Thomam Beard *Clericum*, Jacobum Wingfeild *Militem* & Mariam Wingfeild *Defend.*

Chancery. *Impropriation* not void becauſe of an Eſtate-tail in the Patron, Grantor, &c.

THe Caſe was thus, An. 31. Ed. 1. The King being ſeiſed of the Manor of Kimbolton, to which the Advowſon of the Church of Kimbolton was appendent, by his Letters Patents granted the ſaid Manor, with the

the Appurtenances to Humphrey de Bohune Earl of Hereford, in Taile generale. Humphrey de Bohune the Iſſue in Tail by his Deed, in the 40. of Ed. 3. granted the ſaid advowſon then full of an Incumbent to the Prior of Stoneley, and his Succeſſors: And at the next avoidance they held it, In proprios uſus; And upon this appropriation made, Concurrentibus iis quæ in jure requiruntur, after the death of the Incumbent, the ſaid Prior and his Succeſſors held the ſaid Church appropriate, until the diſſolution of the Monaſtery, in the 27 H. 8. the ſaid Manno^r deſcended to Edward, Duke of Buckingham, as Iſſue to the ſaid Eſtate-tail. And the Reverſion deſcended to King H. 8. The Duke in the 13 H. 8. was attaint of high Treaſon, 14 H 8. The King Granted the ſaid Manno^r, &c. with all Advowſons appendent, &c. to Richard Wingfield, and the Heirs Males of his body, 16 H. 8. It was enacted by Parliament, that the ſaid Duke ſhall forfeit all Manno^rs, &c. Advowſons, &c. which he had, &c. in 4 H. 8. The King, An. 37. H. 8. Granted and ſold for Money the ſaid Rectory of Kimbolton, as impropriate in Fee, which by mean conveyance came to the Plaintiff for 1200 l. An. 37. Eliz. Beard the Defendant did obtain a Preſentation of the Queen by Lapſe, pretending that the ſaid Church was not lawfully impropriate to the ſaid Prior of Stoneley.

1. For this, That Humphrey who did grant it to the Prior, had nothing in it, for that it did not paſs to his Anceſtor by theſe words (Manneriums cum pertinentibus.)

2. Or for this, that he had no more than an Eſtate in tail, and then by his death his grant was void.

But it was reſolved by the Lord Elleſmore, Lord Chancellor, with the principal Judges, and upon conſideration of Preſidents, that the Plaintiff ſhall enjoy the ſaid Rectory. For although that by any thing which can now be ſhewn, the impropriation is defective, for by nothing which now appears, the iſſue in tail had any thing in the Advowſon at the time of his Grant to the ſaid Prior, for that the Advowſon did not paſs by the Grant of the King, by thoſe words (Cum pertinentibus) yet it ſhall be now intended in reſpect of the ancient and continual poſſeſſion, that there was a lawful Grant of the King to the ſaid Humphrey, who granted in Fee, ſo that he might lawfully grant it to the ſaid Prior (Omnia preſumitur ſolenniter eſſe acta.) And all ſhall be preſumed to be done, which might make the ancient Impropriation good: For Tempus eſt edax rerum; And Records and Letters Patents, and other Writings, either conſume or are loſt, or imbezeled: And God forbid, that the ancient Grants and Acts ſhould be drawn in Queſtion, although that they cannot be ſhewn, which at firſt was neceſſary to the perfection of the thing: And if the Impropriation had been drawn in Queſtion, in the life time of any of the parties to it, they might have ſhewn the truth of the matter. But after the death of all the parties, and after ſo many ſucceſſion of ages. In all which the ſaid Church was eſteemed and allowed, to be rightfully impropriate.

If any objection or exception ſhould now prevail, the ancient and long poſſeſſion of the Owners of the ſaid Rectory ſhould hurt them. For if theſe objections or exceptions, had been made in the lives of the parties, without any Queſtion they had been anſwered, or otherwiſe in ſo many ſucceſſions of ages, it would have been impeached or impugned.

Mich.

Mich. 4. Jac. Regis.

Forfeiture. Treaſon.

HIl. 43 Eliz. A Caſe was moved to all the Juſtices, Tenant in Tail before the Statute of 27 H.8. made a Feoffment in Fee, to the uſe of himſelf and his Wife in tail: And after the Statute of 27 H.8. is made, the Husband was attaint of high Treaſon, 31 H.8. and died, the Wife continued in poſſeſſion and died, their Iſſue enter, and die, and this deſcends to his Iſſue: And all this eſpecial matter is found by an Office.

The Queſtion was, If the Iſſue in tail, or the King, ſhall have the land; And it was objected that the right of the ancient Eſtate-tail cannot be forfeited for divers cauſes; Viz.

1. For this, that the ancient Eſtate was diſcontinued, & ſuch right of action cannot be forfeited; As it is agreed in the Marquels of Winchelters caſe.

2. The Feoffer himſelf, as this caſe is, had not any right to the ancient Eſtate-tail (for by his Feoffment his right was utterly gone) was attaint, and he cannot forfeit what he hath not.

3. The Iſſue in tail is remitted to that ancient right which cannot be forfeited: And the new Eſtate-tail which was derived under the diſcontinuance, and which may be forfeited by the Statute of the 26 H.8. cap. 13. is continued; and by Act in Law, Viz. The diſcent and remitter avoided: And the Eſtate of the King may be diveſted out of the King by remitter, which is an Act in Law. As if diſcontinue of Tenant in tail, grant the Land to the King, his Heirs and Succeſſors; and the King grant the land to Tenant in tail for life, the remainder to his Son and Heir apparent for life; Tenant for life dies, the Iſſue by Act in Law is remitted: And by this all the Eſtate of the King which he hath under the diſcontinuance, is diveſted out of him, and with this accords Plow. Com. 489. in Nicols Caſe: ſo in the caſe at the Bar, the new Eſtate under the diſcontinuance which was forfeitable, is now purged by the Remitter of that ancient right; and the Title which the King hath, by that defeated and avoided.

Reſolved that in this caſe the Iſſue in tail was barred: and that which had been ſaid, anſwered, confeſſed, and avoided. For truth it is, that right of Action cannot be given to the King, by the Statute of the 26 H.8. But when Tenant in tail diſcontinues his Eſtate to the uſe of himſelf in tail, & after is attaint of Treaſon, now by the Statute of 26 H.8. he doth not forfeit only the new Eſtate in tail, but by this the right of the ancient Eſtate is barred for ever: for the words of the Statute are, That every Offendor being lawfully convict of high Treaſon, &c. ſhall forfeit to the King, his Heirs & Succeſſors, all ſuch Lands, Tenements & Hereditaments, which any ſuch offendor ſhall have of Eſtate of Inheritance: by which words, if there was not any ſaving, the right of the ancient Eſtate-tail was bound, then the ſaving is, ſaving to every perſon, &c. (other than the Offendors, their Heirs and Succeſſors, and ſuch perſons as claim to any of their uſes) all ſuch rights, ſo that the Offendor and his Heirs are excluded out of the ſaving: For Heirs includes all manner of Heirs, and for this they are bound by the body of the Act.

And ſo note a diverſity between a naked right of Action which is not forfeitable, and an Eſtate of Inheritance which is forfeitable, coupled with an ancient right for which the forfeiture of the Poſſeſſion is barred by the ſaid Act. And when all this appears by Office, then is the Iſſue in tail notwithſtanding the Remitter barred by force of the ſaid Act of Parliament, to which all are parties or privies: And it is not like to the Caſe in Plowden's Com. of Remitter, for this is no Bar of an ancient Right.

Paſch.

Paſch. 4. Jac. Regis.

AT this Parliament held, Paſch. 4. Jac. Regis, It was moved and ſtrongly urged at a Grand Committee of Lords and Commons in the Painted Chamber, that ſuch Biſhops as were made and created after the firſt day of this Seſſion of Parliament were not lawful Biſhops.

1. Admitting that they were Biſhops, yet the manner and form concerning their Seals, Stiles, Proceſs, and Proceedings in their Eccleſiaſtical Courts were not conſonant to Law. And their reaſon was for this, that it is provided by the Statute of 1 Ed. 6. cap. 2. that from thenceforward Biſhops ſhould not be Elective, but Donative by the Letters Patents of the King: And that foraſmuch as at this day all Biſhops are made by Election, and not by Donation of the King, according to the Act; for this Reaſon, if the ſaid Act of 1 Ed. 6. be not in force from the time that it took its effect, the Biſhops are not lawful.

2. By the ſaid Act of 1 Ed. 6. it is further enacted, that all Summons, Citations, and Proceſs in Eccleſiaſtical Courts, ſhall be made in the name and ſtile of the King, and that their Seals ſhall be engraven with the Kings Arms, and that Certificates ſhall be made in the name of the King. And whereas the ſaid Act of 1 Ed. 6. was repealed by a ſpecial Act, 1 Mar. Parliam. 1 cap. 2. Seſſ. 2. And the ſaid Act 1 Mar. is now repealed by a branch of an Act, 1 Jac. cap. 25. verſus finem, for by the ſame Act it is enacted, that the ſaid Act of 1 Mar. ſhall be expreſly repealed: The ſaid Act of 1 Ed. 6. is now in force.

For when an act of Repeal is repealed, the firſt act repealed is revived, &c. as appears in Spencers Caſe, 15 Ed. 3. Title Petition 2.

And for this, it was concluded that the ſaid 1 Ed. 6. cap. 2. being in force by a conſequence all Biſhops made after the Act 1 Jac. were not lawful Biſhops: and for that their ſtile and proceedings after the ſame Act in the Name of the Biſhop, and not in the name and under the Seal of the King; for this cauſe the Proceedings were unlawful, Quia non obſervata forma, infertur annullatio actûs. And theſe were matters of great import and conſequence.

As to theſe Objections, upon conſideration had of them by commandment of the King, it was anſwered and reſolved by Popham Chief Juſtice of England, and Coke Attorney of the King, and afterwards affirmed by the chief Baron, and the other Juſtices then attendant to the Parliament, upon good advice and conſideration, that although the ſaid act 1 Mar. be repealed, that yet the ſaid act 1 Ed. 6. cap. 2. for other cauſes is not now in force, but remains repealed; yet true it is, that when an act of Repeal is repealed, the firſt act as hath been ſaid ſtands in force, and is implicitè revived. But it is to be obſerved, that the ſaid act, 1 Ed. 6. was repealed, annulled, and annihilated by three ſeveral acts of Parliament: And as a man which is bound by three ſeveral Bonds, although he break one or two of them, yet the third which remains whole will bind him: So when the words of three ſeveral acts repeal or annul an act, although that one or two of the acts of repeal or annullation are repealed, yet the other which remains in force, annuls the firſt act: Firſt of all, the act of 1 Mar. expreſly repealed the act of 1 Ed. 6. 2. and the act of 1 & 2 Phil. & Mar. hath likewiſe ſufficient words to repeal and annul the ſaid act of 1 Ed. 6. as to Stile, Seal, and Proceſs, in Court Chriſtian, although that the act of 1 Mar. Parl. 1. had never been made, the words of which act are, and the Eccleſiaſtical Juriſdictions of the Arch-Biſhops, Biſhops, and Ordinaries

dinaries to be in the ſame eſtate for proceſs of Suits, puniſhment of Crimes, and Execution of Cenſures of the Church, with knowledg of cauſes belonging to the ſame, and as large in theſe points as the ſaid Juriſdiction was, An. 20. H. 8. And although that the ſaid act of 1 Mar. hath by expreſs words repealed the ſaid act of 1 Ed. 6. and for that it may be ſaid, that the ſaid act of 1 & 2 Phil. & Mar. could not repeal that which was repealed before; yet it was reſolved that now, in as much as the repeal which the act of 1 Mar. operates is now annulled and repealed, it follows, that if now the act of 1 & 2 Phil. & Mar. be in force, or if the ſaid act of the 1 Eliz. cap. 1. operate only as to the ſaid act of the 1 & 2 Phil. & Mar. it makes that the ſaid act of 1 Ed. 6. cannot alſo ſtand, Quia leges poſteriores priores contrarias abrogant. But it was objected that the ſaid act of the 1 & 2 Phil. & Mar. is repealed by the Statute of 1 Eliz. 1.. And it was anſwered and reſolved that it is enacted by the act of the 1 Eliz. that the ſaid act of 1 & 2 Phil. & Mar. and every branch and article of it (other than for ſuch branches as be hereafter expreſſed) ſhall be repealed: and after by the other branch of 1 Eliz. It is enacted, that all other Laws, Statutes, and every branch thereof repealed and made void by the ſaid act of 1 & 2 of Phil. & Mar. and not in this act eſpecially mentioned and revived, ſhall remain and be repealed and void, as the ſame were before the making of the act: But the act of 1 Ed. 6. was as hath been ſaid repealed by the act of 1 & 2 Phil. & Mar. and the act of 1 Ed. 6. is not revived, ſpecially the act 1 Eliz. yet the act of 1 Ed. 6. remains repealed as it was before the ſecond act, which hath ſufficient words to repeal and annul the act of 1 Ed. 6. and to anſwer both the objections; the Statute of 1 Eliz. cap. 1. revives the act of 25 H. 8. cap. 20. and further enacts, that it ſhall ſtand in full force and effect, to all intents, conſtructions and purpoſes. And by the ſaid act of the ſaid 25 H. 8. cap. 20.. It is provided that at every avoidance of any Arch-Biſhop or Biſhop, the King, his Heirs and Succeſſors may grant to the Prior and Covent, and the Dean and Chapter, &c. a licenſe under the great Seal, as of old time hath been accuſtomed, to proceed to the Election of an Arch-Biſhop, or Biſhop, with a Letter miſſive, containing the name of the perſon which they ſhall elect and chuſe, &c. And further by another branch in the ſame act, It is enacted, that every perſon choſen, elected, and inveſted, and conſecrated Arch-Biſhop or Biſhop, according to the form and effect of this act, ſhall do and execute every the thing and things, as any Arch-Biſhop or Biſhop of this Realm, without the offending of the Prerogative Royal of the Crown, and the Laws and Cuſtoms of the Realm might at any time heretofore do: And theſe two branches anſwer to both the Objections, viz. For the manner of Election and Conſecration of Arch-Biſhops and Biſhops, and alſo for the making and execution of all things which belong to their authority, as any Arch-Biſhop or Biſhop might have done before the making of the ſaid act of 25 H. 8. within which words the Stile and Seal of their Court and the manner of their proceedings are incloſed. And now the act of 1 Eliz. cap. 1. having revived the act of 25 H. 8. and enacted that the ſame ſhall ſtand and be in full force and ſtrength, to all intents, conſtructions, and purpoſes; from hence it follows, that the act of 1 Eliz. reviving the 25 H. 8. hath repealed the act of 1 Ed. 6. for in an act which was repeald, the Repeal is void and annulled: And this was the principal cauſe of the ſaid reſolution, for both the points upon which the ſaid doubts were conceived. And it is to be obſerved, that the intention of the ſaid Repeal by the act of 1 Jac. was to repeal the ſaid act of 1 Mar —— As to an act made 5 Ed. 6. by which it is enacted that the Matrimony of all and every Prieſt, and other Eccleſiaſtical and Spiritual perſons ſhall be adjudged,

damned

deemed, and taken, for juſt, true, and lawful Matrimony, to all intents, conſtructions and purpoſes: And that all Children born in ſuch Matrimony ſhall be deemed and adjudged, to all intents, conſtructions, and purpoſes, to be born in lawful Matrimony, and be legitimate and inheritable, to Lands, Tenements, and Hereditaments; and that they ſhall be Tenant by the Courteſie, and Tenant in Dower, &c. ſo that now the ſaid act of 1 Mar. being repealed, the ſaid act of 5 Ed.6. cap.10. is now in force, and the Matrimony of all Eccleſiaſtical perſons and their Iſſue, lawful and legitimate, to all intents, conſtructions, and purpoſes, by which the doubt amongſt the vulgar is well explained.

But the Repeal of all the act of 1 Mar. by which divers other Statutes were repealed, being repealed generally without any reference as to the ſaid act of 5 Ed.6. according to the intention of the Parliament Sub ſilentio, made the ſaid ſcruple. And yet as it appears by this reſolution upon manifeſt and direct matter, no inconvenience of the general Repeal of the ſaid act 1 Mar. doth enſue.

And note, by our Books it appears, that if a Deacon or Prieſt take a Wife, the marriage was voidable by divorce, and not void, for they had not vowed Chaſtity: And for that, if they had Iſſue, and one of them dies, the Iſſue ſhould be inheritable. But if a Monk, or Nun, or other Religious perſon which had made a Vow of Chaſtity, had married, this marriage is void: And this doth appear 5 Ed.2. Title Non-ability, 26.19. H.7. Title Baſtardy 33. 21. H.7. 39. b.

Mich. 4. Jac.

IT was reſolved in the Star-Chamber in the ſame Term, that the King had not the Pre-Emption of Tin in Cornwal by any Prerogative. For Stanni fodina nec plumbi fodina, &c. or other ſuch baſe Mines, do not belong to the King by his Prerogative, but to the Subject which is Owner of the Land: But the Pre-Emption of Tin in Cornwal, belongs to the King as an ancient Right and Inheritance due to the King, as well of Tin in the Land of the Subject as in his proper Demeſnes: And although that now a reaſon cannot eaſily be rendred of things done before time of memory, yet it may well be, that all the Land of the County was the Demeſne of the King; And upon Grant of the Land the King reſerved the Mines to himſelf, for theſe Mines of Tin are of great antiquity, as appears after, Ex Diodoro Siculo. Et certo certius eſt, that all the Land in England is derived mediately or immediately from the Crown, for all land is held mediately or immediately of the King, and for this reaſon ſuch a Profit apprender may have a reaſonable commencement: And where uſage hath allowed it to the King, it doth belong to him. True it is, that all the County of Cornwal was within the Foreſt of the King: and that it was diſafforeſted by King John, as appears by Camden. And what conſideration the County gave for it to the King concerning Tin cannot now appear, but this appears plainly, that before the 33 Ed.1. all the Tin in Cornwal and Devon alſo, to whomſoever the Land belonged, appertained to the King: And this is proved by divers exprels Records, and by an ancient Charter of King John, amongſt the Records of the Biſhop of Exeter, in hæc Verba. Johannes Dei gratia Rex Angliæ, &c. Omnibus Ballivis ſalutem, Sciatis quod intuitu Dei & pro ſalute animæ noſtræ, &c. dedimus, conceſſimus,

Tin pre-emption in Cornwal.

In Regiſtr.

Co.4. Inſt.232. ceſſimus, ac preſenti charta noſtra confirmavimus Deo & Eccleſiæ Beati Petri Exon.& venerabili patri Simoni Exon.Epiſcopo & ſucceſſoribus ſuis Exon.Epiſcopis, decimam de antiqua firma ſtanni in Com. Devon, & Cornubiæ: Habendam ſibi & ſucceſſoribus ſuis cum omnibus libertatibus & liberis conſuetudinibus ad eam pertinentibus, per manus illius vel illorum qui ſtannarium habuerint in cuſtodia, &c.

Paten. 1 H. 3. memb. 4. Rex, Roberto de Courtney ſalutem. Mandamus vobis quod ſine dilatione & difficultate aliqua,habere faciatis Iſabellæ Reginæ matri noſtræ, ſtannaria com.Devon. cum Cuneo & omnibus pertinent.

Teſte Com. Mariſcallo, &c.

4 H.3. Fines 5 H. 3. Rex conceſſit Johanni, Filio Richardi, ſtannariam in Cornubia reddendo 1000 **Marks.**

10 H.3.mem.9. Rex, &c. Sciatis quod Conceſſimus Richardo dilecto fratri noſtro, ſtannariam noſtram Cornubiæ, cum omnibus pertinentibus, **With Prohibition that none tranſport any Tin without license of the ſaid** Richard.

10 Ed.2.Inqui. 2. num. 29. **For this that** Decima ſtannariæ noſtræ in Com. Cornubiæ & Devon. **do belong to the Biſhop of** Exeter; **It was therefore commanded to the ſaid Sheriff to value the ſaid Stannary, ſo that the Biſhop may have that which to him doth belong,** viz. Vera decima Stannariæ; **In which note** Stannariæ noſtræ.

33 Ed.1. grant all Tinners, vide Plow.com. 327. **Note, there are two ſeveral Charters, both bearing date** 10 Aprilis 33 Ed.1. **The one** Ad emendationem Stannariarum noſtrarum in Com. Devon: **And the other** Ad emendationem Stannariarum noſtrarum in Com. Cornubiæ: Conceſſimus eiſdem Stannatoribus quod fodere poſſunt ſtannum & turbus ad ſtannum fundendum ubique in terris noſtris, & vaſtis noſtris, & aliorum quorumcunque in Comitatu predicto; Et aquas, & aquarum curſus divertere ubi & Quoties opus fuerit, &c. ad Fundaturam Stanni,ſicut antiquitas conſuevit, ſine impedimento noſtro ſeu aliorum quorumcunque: Ac quod omnes Stannatores noſtri prædicti totum ſtannum ſuum ponderatum, &c. licite vendere poſſunt cuicunque voluerint, faciendo nobis & heredibus noſtris Cunageum & alias conſuetudines debitas & uſitatas,niſi nos vel heredes noſtri ſtannum illud emere voluerimus.

33 Ed.1.in the Treaſury. **The liberty granted to Tinners by the ſaid Charter,** 33 Ed. 1. **granted to all Tinners; which Charter of** 33 Ed. 1. **made to the Tinners of** Devon **was confirmed** De verbo in verbo, An.4. Ed.2. **and was alſo confirmed,** An. 1. & 17 Ed. 3.

Rot. Almaine, Anno 12. E.3. part.1.num.17. De adviſamento Concilii noſtri ordinavimus quod ſtannum in Com. Cornubiæ & Devon ad opus noſtrum capiatur pro defenſione Regni noſtri, &c. Et ad partes marinas celeriter mittatur,in auxilium & ſupportationem honorum noſtrorum,&c. Ita quod hominibus quibus ſtannum illud capi contigerit, de pretio ejuſdem ſtanni ad certos terminos ſolvend. ſufficiens ſecuritas per nos fiat, Aſſignavimus vos conjunctim & diviſim ad capiendum,ad opus noſtrum,totum ſtannum inComitatu predicto Cunitum & etiam Cuniend, cum cunitum fuerit. **And there is alſo authority given to take Carriages** Tam per Naves & battellos in Portibus Com. predict. exiſtent. quam Carrecta & alia Carriagia quæcunque pro ſtanno illo uſque ad Portum Southampton Carriando: **And commandment given to the Sheriffs,** Quod ipſi ſumptis pro Carriagiis & aliis neceſſariis in hac parte inveniendis de exitibus ballivarum ſuarum ſolvant.

Edward

Edward the Black Prince deceaſed and the King (under the great Seal) confirmed (the ſame year) to Tydman of Limberge, Cunageum ſtannariæ totius Ducatus Cornubiæ pro tribus annis. Nec non emptionem totius ſtanni, tam infra dictum Ducatum Cornubiæ quam Com. Devon foſſi & fodendi quod vendi debeat pro fine mille marcarum, & reddendo tria mille & quingentas marcas. 21 Ed. 3. cr Rot. Parent.

The ſaid Charter was confirmed at the Suit of the Tinners, 8 Ric. 2. to the Tinners in Cornwal. 8 R. 2.

The ſaid Charter of 33 Ed. 1. to the Tinners of Devon, was confirmed at the Suit of the Tinners, Anno 1 Ed. 4. 1 Ed. 4.

It was alſo at their Suit confirmed, 3 H. 7. to the Tinners of Devon. 3 H. 7.

Vide the Statute of the 11 of H. 7. by which it is ordained that a certain weight and meaſure ſhall be uſed throughout all England; Provided always that this act extend not, nor be in any wiſe hurtful, or prejudicial to the Prince within the Dutchy of Cornwal, or any weights belonging to the Coynage of Tin with the Counties of Cornwal and Devon, but that ſuch Weights ſhall be uſed, &c. as have been accuſtomed. 11 H. 7. cap. 4.

The King gave Commiſſion and power to Gilbert Brockhouſe, to have pre-emption for and in the name of the ſaid King of all white Tin within Cornwal and Devon, for one and twenty years, yielding three thouſand marks Rent. 26 Apr. 7 E. 6. le Roy moruſt in l'an enſuant, &c.

Note the ſtile of the ſaid Courts of Stannaries in Cornwal and Devon, at all times, and during all the Reign of Queen Elizabeth, Mar, Ed. 6, H. 6, H. 7, Ed. 4, H. 6, H, 5, H. 4, &c. Magna Curia Domini regis Ducatus ſui Cornubiæ apud Crokerenten in Com. Devon coram Johanne Comite Bedford, Cuſtode Stannariæ dicti Domini Regis & Reginæ in dicto Comitatu Devon: By which it may appear, that at the firſt all the Tin in the County of Cornwal and Devon belonged to the King: And after the ſaid Charters of 33 Ed. 1. the King may buy all if he will.

And note the antiquity of Tin Mines in Cornwal, Vide Camden in Cornwal, 121. extremum Promontorium quod oceano Vergivio incumbit, Diodoro Siculo dicitur Balerium: Et vide Diodor. Sicul. lib, 5. c. 8. fol. 142. b. Britanni qui juxta Balerium promontorium incolunt Mercatorum uſu qui eo ſtanni &c. Camden in Cornw. f. 134. Diod. Siculus floruit ſub Auguſto.

And as for that, which was objected that the Charter of 33 Ed. 1. extends only to Tin within the Land of the King himſelf: It was reſolved that by the ſaid clauſe (Fodere & fundere ſtannum terris noſtris & vaſtis noſtris & aliorum quorumcunque, &c. Sicut Antiquitas conſuevit, &c. It is manifeſt that the King hath all the Tin, as well in the Land of the Subject as in his own proper Land.

2. It ſhall be abſurd that the King ſhall reſerve the emption of his own Tin.

3. The King grants Stannatoribus noſtris, divers Liberties and Immunities which are all enjoyed as well by the Tinners in the Lands of the Subject, as by thoſe in the Lands of the King, &c.

In the Session of Parliament held in *Decemb. An.* 4. *Jac. Regis.*

Prerogative of the King in Salt-peter.

ALL the Justices, Viz. Popham chief Justice of England, Coke chief Justice of the Common Pleas, Fleming chief Baron, Fenner, Searl, Yelverton, Williams, and Tanfield, Justices, were assembled at Serjeants Inn, to consult what Prerogative the King had in digging and taking of Salt-peter to make Gun-powder by the Law of the Realm; And upon conference between them, these points were resolved by them all, Una voce.

I. Point. That although the invention of Gun-powder was devised within time of memory, viz. in the time of R. 2. yet in as much as this concerns the necessary defence of the Realm, he shall not be driven to buy it in forreign parts; and forreign Princes may restrain at their pleasure, in their own Dominions: And so the Realm shall not have sufficient for the defence of it, to the peril and hazard of it: And therefore insomuch as Salt-peter is within the Realm, the King may take it according to the Limitations following, for the necessary defence of the Kingdom.

II. Point. Although the King cannot take the Trees of the Subject growing upon his Freehold and Inheritance, as it was now lately resolved by us the Justices of England, and although he cannot take Gravel in the Inheritance of the Subject, for reparation of his houses, as the Book is in 11 H. 4. 28. Yet it was resolved that he may dig for Salt-peter, for this that the Ministers of the King who dig for Salt-peter, are bound to leave the Inheritance of the Subject in so good plight as they found it, which they cannot do if they might cut the Timber growing, which would tend to the disinheritance of the Subject, which the King by Prerogative cannot do; for the King (as it is said in our Books) cannot do any wrong.

And as to the case of Gravel, for reparation of the houses of the King, it is not to be compared to this case; for the case of Salt-peter extends to the defence of the whole Realm, in which every Subject hath benefit, but so it is not in the case of the reparation of the Kings houses: and for this it is agreed in the 13 H. 4. and other Books, that the King may charge the Subject for Murage of a Town, to which the Subjects were charged in the time of insurrection or War, for safety: and so for Portage, for this that he which is charged hath benefit by it, but the King cannot charge the Subject for the making of a Wall about his own house, or for to make a Bridg to come to his house; for that doth not extend to publick benefit: But when Enemies come against the Realm, to the Sea Coast, it is lawful to come upon my Land adjoyning to the same Coast, to make Trenches or Bulwarks for defence of the Realm, for every Subject hath benefit by it. And for this by the Common Law, every man may come upon my Land for the defence of the Realm, as appears 8 Ed. 4. 23. And in such case on such extremity they may dig for Gravel, for the making of Bulwarks; for this is for the publick, and every one hath benefit by it: but after the danger over, the Trenches and Bulwarks ought to be removed, so that the Owner shall not have prejudice in his Inheritance: And for the Common-wealth, a man shall suffer damage; as, for saving of a City or Town, a House shall be plucked down if the next be on fire: And the Suburbs of a City in time of War for the common safety shall be plucked down, and a thing for the Common-wealth every man may do without

without being liable to an action, as is said in the 3 H.8. fol.15. And in this case the Rule is true, Princeps & Respublica ex justa Causa possunt rem meam auferre.

It was resolved that this taking of Salt-peter is a purveyance of it for the making of Gun-powder, for the necessary defence and safety of the Realm. And for this cause, as in other Purveyances, it is an incident inseparable to the Crown, and cannot be granted, demised, or transferred to any other, but ought to be taken only by the Ministers of the King (as other Purveyances ought) and cannot be converted to any other use than for the defence of the Realm, for which purpose only the Law gave to the King this Prerogative; and it is not like to the Mines of Gold and Silver, for there the King hath interest in the Metal, and for this, there he may dig for it, Quia quando lex aliquid alicui Concedit, concedere videtur id, sine quo res ipsa esse non potest. Vide Plow. Com. in le Case de Mines. So the King may dig in the Land of the Subject for Treasure trove, for he hath property: And if the Powder which is so made by the Ministers of the King, begin to decay (as it will in two years) then it ought to be changed for other, or the money coming of it ought to be imployed for Powder for the defence of the Realm; or the Ministers of the King ought to make provision of Salt-peter which will endure a long time, and when need is, to make it into Gun-powder, which may be made before the Navy can be put in readiness. III. Point.

The Ministers of the King cannot undermine, weaken, or impair any of the walls or foundation of any Houses, be they Mansion houses, or Out-houses, or Barns, Stables, Dove-houses, Mills, or any other Buildings: And they cannot dig in the Flor of my Mansion house which serves for the habitation of man, for this, that my house is the safest place for my refuge, safety, and comfort, and of all my Family; as well in sicknels as in health, and it is my defence in the night and in the day, against Felons, Mis-doers, and harmful Animals; and it is very necessary for the Weal-publick, that the habitation of Subjects be preserved and maintained. IV. Point.

And there are two notable Presidents, by which it appears, that the King by his Prerogative had power to prohibite Depopulation, and provide for habitation.

The one in the 43 Ed.3. Rot. claus. in Turri. numero 23. pro villa de Southampton.

The other, An.21.R.2. in dorso Clause. par.1. N.15. by which the King prohibits that, Incolæ villarum predictarum non prosternant domus suas in villis predictis in alias migraturi regiones. &c.

Also the Ministers of the King cannot dig the flor of any Barn imployed for the safe custody of any Corn, Hay, &c. of the Owner, for that the flor of a Barn cannot be made dry and serviceable again in a long time: But they may dig in the flors of Stables and Ore-houses, so that there be sufficient room left for the Horses and other Cattel of the Owner: And so that they repair it in convenient time, in so good plight as it was before; Also they may dig in the flors of Cellars and Vaults, so that there be sufficient room for the necessaries of the Owner; and so that the Wine, Beer, and other necessary provision of the Owner be not removed, or in any sort impaired, and they may dig any mud-walls which are not the Walls of any Mansion house, so that order be taken that the Mansion house be well defended, as it was before; so they may dig in the ruines and decays of any House or Buildings, which are not preserved for the necessary habitation of men.

They

V. Point. They ought to make the places in which they dig, so well and commodious to the Owner as they were before.

VI. Point. They ought to work in the possession of the Subject, but betwixt Sun rising and setting; so that the Owner may make fast the Doors of his House, and put it in defence against Mis-doers.

VII. Point. They ought not to place or fix any Furnace, Vessels, or other necessaries in any house or building of the Subject without his consent, or so near any Mansion house, as by it, it may receive prejudice or disquiet.

VIII. Point. They ought not to continue in one place over a convenient time, nor to return again into the same place before convenient time (which is long time) be passed.

IX. Point. It was resolved that the Owner of the Land cannot be restrained from digging and making Salt-peter, for the King hath not interest in it as he hath in Gold and Silver in the Land of the Subject, for the King in the case of Salt-peter hath but purveyance, so that the property of it is in the Owner, and for that he cannot be excluded of the Commodity in his own Land.

And it is to be observed, that before 31 Eliz. which was the next year after the Spanish Invasion, there was not any license or commission of any King or Queen of this Realm, for the taking of Salt-peter: But in the said 31 year there were two Licenses Granted.

The one particular to George Constable Esquire, and the other general to George Evelin, Richard Hills and John Evelin. The first gives Constable power and authority for eleven years to dig, open, and work for Salt-peter within the County of York, Notingham, Lancaster, Northumberland, Cumberland, and the Bishoprick of Duresme, as well within Our Lands, Grounds, and Possessions: as also within the Lands, Grounds, and Possessions of any of our loving Subjects within the Counties aforesaid: And the consideration of the Patent was for a great quantity of Salt-peter yearly by the said George Constable to be made and provided for the Store of the Queen, at a lower rate than before was paid.

And further, Our will and pleasure is, that the said George Constable, &c. shall at his own proper costs and charges, erect, make up, and lay all mud-walls, Stables, and Grounds whatsoever so digged up, &c. In which license it was observed, that no power is given to dig in any Mansion house, Barns, Dove-houses, &c. but, as appears in the last Clause, in mud-Walls, Stables, and Grounds; for the Clause of reparation ought without question to extend to all the places to which the power to dig extends, &c.

The other Commission to Evelin, &c. extends to all the Realm of England and Ireland, and all other dominions of the King, as well within our own Lands, Grounds, and Possessions, as also within the Lands, Grounds, and Possessions of any of our Subjects.

Note, the License begins with Lands, &c. so that Houses nor Buildings are not named in it: for the Learned Council of the Queen, as it should seem, who drew the License, thought not that the License ought to extend to the Mansion house, or other necessary houses; for otherwise it would have been expressed in the License. And after, Scilicet 18 Oct. 2 Jac. Commission was granted to Evelin, and others, to take Salt-peter in the Lands, Possessions, and other convenient places, and in convenient times, so that there were but three Licenses or Commissions ever made. And

in

in none of them any power by express words is given to dig in any Mansion house, &c. And in none of them is any Prohibition to the Subject to dig in his own Land: And it is observed that in the said last Commission is a clause, that for carriage none ought to go above nine miles from his own house, and that he shall have 4d. for every mile laden and empty, viz. Eundo & Redeundo. And the reason was, the Owner may return again to his own house in the same day: And note, Reader, here is a good Resolution of the Justices for the true Prerogative of the King in taking purveyance of Salt-peter.

Hill. 4. Jac.

Treason.

IN this very Term, one George Leak a Clark in Chancery, had upon an ordinary piece of Parchment, by great deceit, fixed with a kind of Glew, another Parchment so thin, as art could make it, so that it did appear but one piece of Parchment; And upon the thin piece, which was as it were the superficies of the other, he writ by good warrant a License, which was brought to the Lord Chancellor, and sealed with the Great Seal: And after, the said George took the thin piece upon which the writing was, from the other Parchment to which the great Seal was affixed, and then all was a Blanck with the great Seal annexed: And after the said George writ upon the blanck a Grant of the King of certain Lands: And what offence this was, was this Term debated amongst the Justices; And it was a great question amongst them, Whether this was high Treason or no: And it seemed to me, that this cannot be adjudged high Treason, until it was so declared by Parliament: For true it is, that the Statute of 25 Ed. 3. declares that if a man do counterfeit the great Seal or Privy Seal, that this is high Treason: And true it is, that the Judges in times past, viz. 2 H. 4. 25. have adjudged that the taking of that which was printed with the great Seal from one Patent, and fixing of it to another Writing made in the name of the King is a counterfeiting of the great Seal, for this that he abuseth the ancient Seal, in removing of it from the Patent, and fixing of it on another without warrant: And so Stamf. lib. 1. fol. 3. proves that it was adjudged in his time; and yet 40 Ass. pla. 33. that it was petit Treason after the Statute; And 37 H. 8. Title Treason, Brook by the Justices that this was not Treason: And I have seen a Record of 2 H. 4. the 25. where the party was indicted generally for counterfeiting of the great Seal; And the Jury found him not guilty of counterfeiting of the great Seal, as it was supposed by the Indictment: And found over the especial matter, that he took the great Seal from one Patent, and fixed it to another, and put this in execution: And judgment is given against the party. But without question against the Law, for as much as they found him not guilty of counterfeiting, for this is a full Verdict, and all the rest is Surplusage; but this case in question much differs from it, for in this case George Leak hath not any medling with the great Seal, but this remains now annexed as it did before: And for this reason it seems to me, if the Seal be fixed to a blanck Patent, and one writes a Grant in it, contrary to his direction and trust; or if one hath Letters Patents with good warrant made, and raise them in a place material, and put in other words, to the great prejudice of the King: In none of these cases can it be adjudged a counterfeiting of the great Seal. For the Statute of 25 Ed. 3. doth not speak of counterfeiting of writings, but only of the great Seal.

And

And the Delinquent in this case doth not meddle with the Seal, but only with the Writing. And I shewed a notable president in Clauſ. 42. Ed. 3. memb. 8. in dorſo, where the Case was, that King R. 1. by his Charter granted divers Lands and Liberties, Abbati de Bruera, in which the Abbot raſed out this Fiffetruda, and inſtead of it writ Eſt-leigh, And upon the ſhewing of it obtained a Confirmation of it from King Ed. 3. and an allowance of it in Banco R. And for this offence the ſaid Abbot was called before the King and his Council, viz. in the Star-chamber; where the Abbot charged one Robert Rigg his Com-Monk, with the raſure: And the Abbot was convict (which could not be but in Court) and it was part of the Sentence, that the ſaid Charter-confirmation and allowance of it, ſhould be brought in by the Abbot to be cancelled. Out of which Record, I do obſerve five things.

1. The antiquity of the Star-Chamber, and this then was a Court, in which the Abbot was convict, and ſentence given.

2. That the ſaid Raſure was not any Counterfeit to the Great Seal; for if the offence had been high Treaſon, it ſhould not have been determined before the Council of the King in the Star-Chamber.

3. That Spiritual perſons were then puniſhable for offences before Temporal Judges.

4. That if there be raſure of a Deed betwen Subject and Subject, in a place material, all the Deed becomes naught: and the party to plead to it Non eſt factum. So if the Patentee raſe his Letters Patents in any place material, all the Patent becomes of no force by the Law, as appears by the ſaid Sentence, All the Patent and all the dependance upon it, viz. The confirmation and allowance of it, ſhould be all cancelled and defaced.

5. That although that it is commonly ſaid, that an Abbot can do nothing in prejudice of his houſe, yet in this caſe he may do it, for the King ought not to be in worſe caſe than a Subject: And if the Abbot had raſed a Charter made to him by a Subject, in ſuch a manner as he had raſed the Charter of the King, the Deed of the Subject had become of no force: And ſo in caſe of the King. And then I conclude, that if the raſing of a Word in the Patent of the King, be not Treaſon, the raſing of two or three, or all the words of the Patent, and writing a new Grant, is not Treaſon: And I recited another Preſident in An. R. 2. in Parliament, where the caſe was, that the Ambaſſador of the Duke and State of Genoa, being here under the ſafe conduct of the King, for the buſineſs of the King and the Realm, was murthered by certain Subjects of the King: And this matter was debated in Parliament, and there reſolved, declared, and decreed, that this was treaſon: Note it well, this caſe was not referred to the Judges, but was declared in and by Parliament: For it is provided by the ſaid act of 25 E. 3. that for this that many other caſes of like Treaſon might happen in time to come, which men cannot think nor declare at preſent, that if another caſe, ſuppoſed Treaſon, and which is not ſpecified in the act ſhall come before any of the Juſtices, the ſaid Juſtices ſhall ſtay without going to Judgment of Treaſon, until the caſe be ſhewen before the King in Parliament, who ought to adjudge it Treaſon or other Felony; In which branch two things are to be obſerved,

John-------- Imperiall.

1. That although a caſe happen like to the caſes of Treaſons mentioned in the ſaid act, that the Judges ought not (as they do in other caſes by equal and like reaſon) adjudg it to be Treaſon, for that branch reſtrains them: But this ought to be declared in Parliament; for the words of the act are, Foraſmuch as many other caſes of Treaſon, like, &c. The Second thing is, that when a particular caſe (as the ſaid caſe of an Ambaſſador of a King) was adjudged high Treaſon, Et Legatos violare contra jus gentium

tium est: And it appears 2 Sam. cap. 10. Hanun Rex Amonitarum Legatos Davidis contumeliis, &c. super quo acerrimum bellum movetur, &c. By which it appears the consequence of an abuse of an Ambassadour, &c. Quod talis injuria est justi belli causa. Note that Legatus ejus vice fungitur, à quo destinatur; & honorandus est, sicut ille cujus vicem gerit. And afterwards George Leake, upon examination before the Chief Justice of England, made a clear confession of all the manner and circumstances of the fact; and upon examination, the case (as it was delivered to the Justices to consider of it, and to give their opinions) was such; George Leake joined two blanck Parchments fit for Letters Patents, so close together with mouth Glew, as they were taken for one, and did put one Label through them both; Then upon the uppermost he writ a true Patent and got the Great Seal put to the Label, so the Label and the Seal were annexed to both the Patents, the one written and the other blanck, then he cut off the glewed skirts round about, and took off the uppermost thin Parchment (which was written, and was a perfect Patent) from the Label which with the great Seal did still hang to the blanck Parchment; then he writ another Patent within the blanck Parchment, and did publish it as a good Patent: Hereupon two Questions were moved.

1. Whether this offence be high Treason, or no?

2. If it be high Treason, then whether he may be indicted generally for the counterfeiting of the great Seal, or else the special fact must be expressed: and the Justices were divided in opinion in the first point of the case: and my self and divers others held that this act was neither high Treason, nor petit Treason; because it is not within either of the branches of the said statute of 25 Ed. 3. but it is a very great misprision; and the party delinquent liveth at this day. But the Chief Justice and divers others were against us; And by reason of the diversity of opinions, Respectuatur, vide Fleata lib. 1. cap. 22. Item crimen Falsi dicitur, cum quis illicitus cui non fuerit ad hæc data authoritas, de sigillo Regis rapto vel invento brevia chartacea consignaverit. As to the second point, it was resolved that if the special matter had amounted to counterfeiting of the great Seal in Law within the said Statute, then he might have been generally indicted of high Treason for counterfeiting the great Seal: as if a man in a fray kill a Constable that comes to keep the Kings peace without any express malice prepensed, this is murder in Law; and yet the delinquent may be generally indicted of murder by malice prepensed. 25 H. 8. cap. 12.

Hill. 24. Eliz.

IN the Exchequer; a Merchant brought eighty weights of Bay-salt by Sea to a Haven in England, and out of the Ship sold twenty weights, and discharged them to another ship in which they were transported: but the said twenty weights were never actually put on the shore: And for the residue, viz. 60. he agreed for the Custom, and put them upon Land: And now the doubt was upon the words of the Statute of 1 Eliz. cap. 11. concerning Exportation, viz. sent from the Wharf, Key, or other place on the Land, and concerning Importation, take up, discharge, and lay on Land: If in this case the said twenty weights which always were water-born, and never touched the Land, ought to pay Custom as well inwards as outwards. Custom.

And it was resolved, that in both the cases Custom ought to be paid;

for the discharging out of the Ship upon the Sale aforesaid, amounts in Law to a putting them upon the Land, for in the Law this is Infra corpus comitatus: And if the Law shall not be so taken, the King may be defrauded of all his Custom, and in the case forasmuch as no Custom was paid, it was resolved that the Goods were forfeited, &c.

Note, a good diversity when the King shall be bound by act of Parliament, so that he cannot dispense with it by any clause of Non obstante. No act can bind the King from any Prerogative which is sole and inseparable to his person, but that he may dispence with it by a Non obstante, as a Soveraign power to command any of his subjects to serve him for the publick-Weal; and this solely and inseparably is annexed to his person: and this Royal power cannot be restrained by any act of Parliament, neither in Thesi, nor in Hypothesi, but that the King by his Royal Prerogative may dispence with it: for upon commandment of the King, and obedience of the Subject, doth his Government consist: As it is provided by the statute of 23 H 6. cap.8. that all Patents made or to be made of any Office of a Sheriff, &c. for term of years, for life, in Fee-simple, or in tail, are void and of no effect, any Clause or Parol de non obstante, put, or to be put into such Patents to be made, notwithstanding. And further, whosoever shall take upon him or them to accept or occupy such Office of Sheriff by vertue of such Grants or Patents, shall stand perpetually disabled to be or bear the office of Sheriff within any County of England by the same authority: and notwithstanding that by this act, 1. The Patent is made void, 2. The King is restrained to grant Non obstante, 3. The Grantee disabled to take the Office, yet the King by his Royal soveraign power of Commanding may command by his Patent (for such causes as he in his Wisdom doth think meet and profitable for himself and the Common-Wealth, of which he himself is solely judg) to serve him and the Weal-publick, as Sheriff of such a County for years, or for life, &c. And so was it resolved by all the Justices of England, in the Exchequer Chamber, 2 H.7. 6. And so the Royal power to pardon Treasons, Murders, Rapes, &c. is Prerogative incident solely and inseparably to the person of the King; and for this Non obstante an act of Parliament, to make the pardon of the King void and restrain the King to dispense with this by Non obstante, and to disable him to whom the pardon is made, to take or plead, it shall not bind the King, but that he may dispence with it; and this is well proved by the act of 13 R.2. Parl.2. cap.1. For by this it was enacted, that no Charter of Pardon from henceforth be allowed by whatsoever Justices, for Murders, Treason, Rape of a Woman, nor be specified in the said Charter, and if it be otherwise, Be the Charter disallowed.

Note, this was the surest way that the Parliament could take to restrain the King to pardon Murder, unless that he pardon it by express terms, which they thought the King would not, for they knew that the King could not be restrained by any act to make a Pardon; for mercy and power to pardon is a Prerogative incident solely and inseparably to the person of the King: and it hath oft-times been adjudged that the King can pardon Murder by general words without any express mention, with Non obstante the said Statute, Sir 4 H.4.cap.31. In which it is ordained that no Welsh-man be Justice, Chamberlain, Treasurer, Sheriff, Steward, Constable of a Castle, Escheator, Coroner, or chief Forrester, nor other Officer whatsoever, nor keeper of Records, &c. in any part of Wales, notwithstanding any Patent made to the contrary, with clause of Non obstante licet sit Wallicus natus: and yet without Question, the King may grant with a

Non

Non obstante. So Purveyance for the King and his Houshold, is incident solely and inseparably to the person of the King: and for this cause, the act of Parliament held in time of Henry 3. de tallagio non concedendo, Title purveyance, Rastal, which bars the King wholly of Purveyance, is void, as it appears in Co. lib. fol. 69. But in all such cases, although that the King may dispence with Statutes, yet a general dispensation or grant without Non obstante is void: But in things which are not incident solely and inseparably to the person of the King, but belong to every Subject and may be severed, there an act of Parliament may absolutely bind the King: As if an act of Parliament do disable any Subjects of the King, to take any land of his Grant, or any of his subjects (as Bishops) as it is done by the statute 1 Jac. cap. 3.) to grant to the King, this is good; for to Grant or take Lands or Tenements is common to every Subject: And for this it is not Proprium quarto modo, to Kings, Scilicet omni soli & semper, vide the Case of Deans and Chapters upon the Statute of 13 Eliz. vide 8 R. 2. cap. 2. & 33. H. 6. That none shall be Justice of Assize, &c. in the County where he was born, or did inhabit, and yet the King with special Non obstante may dispense with this, for this belongs to the inseparable Prerogative of the King, viz. his power of commandment to serve, &c.

Hill. 4. Jac. Regis.

NOte Mich. 4. Jac. post Prandium, There was moved a question amongst the Judges and Serjeants at Serjeants Inn, If the high Commissioners in Ecclesiastical causes, may by force of their Commission imprison any man, or no?

High Commissioners, if they have power to Imprison.

First of all it was resolved by all, that before the Statute of 1 Eliz. cap. 1. the King might have granted a Commission to hear and determine Ecclesiastical causes: But then notwithstanding any clause in their Commission, the Commissioners ought to proceed according to the Ecclesiastical Law allowed within this Realm, for he cannot alter neither his temporal nor his Ecclesiastical Laws within this Realm by his Grant or Commission: Vide Caudries Case. 5 Report. And they could not in any case have punished any delinquent by Fine or Imprisonment, unless they had authority so to do by Act of Parliament. Then all the question rests upon the act of 1 Eliz. which as to this purpose rests upon three branches.

1. Such Commissioners have power to exercise, use, occupy, execute all Jurisdiction Spiritual and Ecclesiastical.

2. Such Commissioners by force of Letters Patents have power to visite, reform, &c. all Heresies, &c. which by any manner of Spiritual or Ecclesiastical power, &c. can, or lawfully may be reformed, &c. so that these branches limit the Jurisdiction, and what offences shall be within the Jurisdiction of such Commissioners, by force of Letters Patents of the King: And this is all, only such Offences may lawfully be reformed by the Ecclesiastical Law.

3. The third branch is, that such Commissioners after such Commission delivered to them so authorised, shall have power and lawful authority by vertue of this Act, and the said Letters Patents, to exercise, use, and execute all the Premises according to the tenor and effect of the said Letters Patents. This branch gives them power to execute their Commission. But it was objected, that this branch doth not give to the Quæn power by her Letters Patents to alter the proceedings of the Ecclesiastical

Law, or gave to the Queen absolute power by her Letters Patents, to prescribe what manner of proceedings, or punishment concerning the Lands, Goods, or bodies of the Subject; and this appears by the Title of the act restoring to the Crown the ancient Jurisdiction, so that the intent was to make restitution, and not any innovation in proceeding or punishment: And it was observed that this last branch gave to them power to execute all the Premises, according to the tenor and effect of the said Letters Patents, so that these words So authorised in the said Letters Patents, have relation only to the authority of the Letters Patents, before specified, viz. such as gave to them power to visit, reform, redress, order, correct, and amend, all Errors, Heresies, Schisms, Abuses, Contempts, and Enormities whatsoever; which by any manner of Spiritual or Ecclesiastical power, can or may lawfully be reformed, &c. These are the tenor and effect of the Letters Patents before remembred: And if any other construction shall be made,

1. It shall be against the express Letter, Scilicet, said Letters Patents.
2. It shall be full of great peril and inconvenience, for then not only imprisonment of body, but confiscation of Lands, Goods, &c. and some corporal punishment may be imposed, for Heresie, Schism, Incontinence, &c. Also power may be given to them to burn any man for Heresie, which shall be against the common Law of the Land.

See *Simpson*'s case in the forty second of *Eliz.* now reported by my Lord *Coke* in 4. Inst. 333.

12

Of the Stealing of Women.

Women. Felony.

NOte the Statute of 3 H.7. cap. 12. stands upon a preamble and a purview; the preamble is, where Women, as well Maids as Widows and Wives having substance, &c. and some being Heirs apparent, &c. for the lucre of such substance, be oftentimes taken by Mis-doers contrary to their wills, and after married, &c. or defiled: So note these three words in the Preamble, Viz.

1. Be taken,
2. Be married,
3. Be defiled.

The Purview is, that what person or persons from henceforth that taketh any woman so against her will unlawfully, viz. Maid, Wife, or Widow, that such taking, procuring, and abetting to the same, and also receiving the said woman so taken against her will, and knowing the same, be Felony. And that such Mis-doers, Takers, and Procurers to the same, and Receivers, knowing the said Offence in form aforesaid, be henceforth reputed and judged as Principal Felons; so that it is not said in the Purview so taken, married, or defiled, but only so taken against their will: And upon this great Question was moved, 4 & 5 Phil. & Mar. in the Star-Chamber, If the Eloinment against her will, without marriage, or carnal copulation (which is intended by this word Defiled) be Felony or no: And the opinion of Brook, and some other of the Justices was, that it was Felony; But Sanders chief Justice was against it; and afterwards, as Periam chief Baron did report, It was resolved by all the Justices in the 26 Eliz. that such Eloinment only is not Felony by the intent of the Statute, without marriage or carnal copulation, for the mischief was not only the taking, but the marriage or the defiling, which was (as it was said in the Preamble)

Preamble) to the diſparagement of the ſaid woman, and utter heavineſs and diſcomfort of her friends: And the Purview ought to purſue the miſchief.

Secondly, this word So, hath reference to the Preamble, and all the miſchief contained in it.

Note by the expreſs Purview of the Act, the acceſſary both before and after is made principal, &c. but by a conſtruction of the Common Law, they that receive the Miſ-doers and not the women are acceſſaries: for this act makes the receivers of the women the principals.

Paſch. 4. Jac. Regis.

13

NOte by the commandment of the King, it was referred to Popham cheif Baron, and my ſelf, what right the Queen which now is, hath, and in what caſes to a right claimed by her, called Aurum Reginæ, that is to ſay, Pro centum marcis argenti una marca auri ſolvend. per illum qui ſponte ſe obligat: And upon conſideration had of it by a long time and view of all the Records and Preſidents, Viz. Librum Rubrum in Scaccario, fol. 56. de Auro Reginæ, where it is ſaid, that this is to be taken De iis qui ſponte ſe obligant Regi, &c. which is the foundation of this Claim: And of a Record in the Tower, 52 H. 3. And of a Record in the Exchequer, 4 E. 1. And of a Record in the Exchequer, Hill. 12. Ed. 3. And in the Tower in the ſame year, in Rot. clauſ. And of Acts of Parliament, 15 Ed. 3. cap. 6. & 31 Ed. 3. cap. 13. and the 13 R. 2. in Turri, and divers other Preſidents and Proceſs out of the Exchequer in the time of R. 2. H. 4. and other Kings, until the time of H. 7. Aurum Reginæ.

It was reſolved that the Queen hath right to it, but with theſe limitations. Reſolution.

1. That it ought to be Sponte by the Subject ſine coactione, ſo that this ought to be at the pleaſure of the Subject, whether he will offer, or give, or no: And for this all Fines upon Judgment, or by offer or fine for alienation, or in any other caſe where the Subject doth not do it ſponte ſine aliqua coactione, viz. That the King of right ought to have it, there the Queen ſhall have nothing.

2. It ought to be Sponte, ſine conſideratione alicujus reventionis ſeu intereſſe, That the King hath in Eſſe, in Jure Coronæ: And for this upon ſale or demiſe of his Lands, or Wares, or Goods of Felons, Out-laws, & ſimili caſu, for theſe are Contracts and Bargains concerning the Revenues and Intereſts of the King: And it cannot be ſaid in ſuch caſe that the Subjects ſponte ſe obligant, as to purchaſe, or buying any the Revenues or Intereſts which the King hath.

3. It ought to be ſponte ſuper conſiderationem, & non ex mera gratia & benevolentia Subditi; For that which is of meer Grace is not properly ſaid of Obligation or Duty, and the words of the Records are to have De iis qui ſponte ſe obligant, And ſo was it ordained by the King and his Council, as appears by the Record of Hill. 4. E. 1. in Scaccario, &c.

4. It ought to be Sponte ſuper conſiderationem quæ non attingat reventionem ſeu intereſſe Coronæ, in any thing which the King hath: As if the Subject give to the King Sponte a ſum of money for license in Mortmain or for to create a Tenure of himſelf, to have a Fair, Market, Park, Chaſe, or Warren, within his Manor, there the Queen ſhall have it: For the Subject did this Sponte, and was not conſtrained to it: And this doth not concern

cern any Revenue or Interest of the King: But if the King hath a Fair, or Market, or Park, or Warren, and grant it for a sum of money, there the Queen shall have nothing; for this was a thing in Esse, and parcel of the Revenue of the Crown: and by that it appears, that forasmuch as little or nothing is given in such case where this of right is due, this is not now of any such value as was pretended: And this resolution was reported to our Soveraign Lord the King by Popham, in the Gallery at Whitehall.

Pasch. 5. Jac. R.

Forests, Chases.

IN this same Term it was informed to the King that great wrongs were done in his Forest of Leicester in the County of Leicester; and in his Forest of Bowland in the County of Warwick, &c. parcel of his Dutchy of Lancaster: And upon this, by warrant of the King under his Signet, all the Justices were assembled to resolve certain questions, to be moved concerning the Forests by the Attorney of the Dutchy, and the Council of the other part, which were Forests and which Chases; the which being matter in fact, the Judges could not give their resolutions but by a way of direction: And it was resolved by them, that if these are Forests, it will appear by matter of Record, as by Eyres of Justices of Forests, Swannymotes Officers of Forests, as Regardors, Agisters, Verderors, &c. But the appellation of it by the name of a Forest in Grants, Offices and Conveyances, is not any proof that this is a Forest in Law.

2. It was resolved by all the Justices, that if these are not other than free Chases, and no Forests in Law, then he who hath any Free-hold within them, may cut his Timber and Wood growing upon it, without any view or license of any: But if he cut so much, that there is not sufficient for Covert, and to maintain the Game of the King, he shall be punished at the suit of the King. And so if a common person hath Chase in another Soil, the Owner of the Soil cannot destroy all the Covert, but ought to leave sufficient Covert, and sufficient Brouse-wood, as hath been accustomed.

3. It was resolved, that within such a Chase the Owner of the Soil by prescription may have Common for his Sheep, and Warren for Conies, by grant or prescription: But he cannot surcharge with more than hath been used, then from which, &c, nor make Burrows in other places than hath been used from the time of which, &c. unless he hath Warren by Grant, and then he may use it according to his Grant; but he cannot erect a new Warren without Charter.

4. It was resolved, that he who hath such a Warren may lawfully build upon his Inheritance, within his Warren, a convenient Lodg for preservation of his Game.

5. It was said by Popham chief Justice, that it was adjudged in the time of the chief Baron Bett, in the Exchequer, that a man may prescribe to cut his Wood upon his own Inheritance within a Forest, although it was against the Act in the 43 Ed. 1. which is in the Abridgment, Title Forest 21. And this was the case of Sellenger, for the Wood in the Forest of Hay in the County of Hereford: And their reason was for this, that this was but a Declaration of the Common Law, and it may be tolled by Custom, as Littleton said: vid. 2. Ed. 2. Title Trespass, fol. 9. in the time of Ed. 1. Trespass 239. Plowd. Com. Dyer 72. 322 Ed. 4. cap. 7. that the Subject may have a Forest: But this is intended if he hath power to have Swainnimotts and Justices in Eyre and Foresters appendant to his Forests.

Consuetudo

Conſuetudo ex rationabili cauſa uſitata privat communem legem: And it was held by ſome that this was but an Ordinance, and not any Act of Parliament.

Paſch. 5. Jac. Regis.

15

IN this very Term between Rice ap Evan ap Floyd, and Richard Barker, one of the Juſtices of the Grand Seſſions in the County of Angleſey, and others defendants: It was reſolved by Popham and Cook chief Juſtices, the chief Baron, and Egerton Lord Chancellor, and all the Court of Star-Chamber, that when a grand Inqueſt indicts one of Murther or Felony, and after the party is acquitted, yet no conſpiracy lies for him who is acquitted, againſt the Indictors, for this that they are returned by the Sheriff by proceſs of Law to make enquiry of offences upon their Oath, and it is for the ſervice of the King and the common-wealth. And as it is ſaid in the 10 Eliz. 265. they are compellable to ſerve the Law, and the Court; and their Indictment or Verdict is matter of Record, and called Veredictum, and ſhall not be avoided by ſurmiſe or ſuppoſal, and no attaint lies. And for this reaſon they ſhall not be impeached, for any conſpiracy or practice, before the Indictment: For the Law will not ſuppoſe any unindifferent, when he is ſworn to ſerve the King: And with this agrees the Books in 22 Aſſ. 77. Aſſiſe. p. 12. 21 Ed. 3. 17. 16 H. 6. 19. 47 Ed. 3. 17. 27 H. 8. 2. F.N.B. 115 a. But it is otherwiſe of a Witneſs; for if he conſpire out of the Court, and after ſwear in the Court, his Oath ſhall not excuſe his conſpiracy before; for he is a private perſon, produced by the party and not returned by the Sheriff, who is an Officer ſworn, and the Jurors are ſworn in Court as in different perſons: And the Law preſumes, that every Juror will be indifferent when he is ſworn; Nor will the Law admit proof againſt this preſumption.

Conſpiracy doth not lie againſt a Juror or Indictor, but againſt a Witneſs.

vi Bridgmans rep. pag

2. It was reſolved, that when the party indicted is convict of Felony by another Jury upon Not guilty pleaded, there he never ſhall have a Writ of Conſpiracy, but when the party upon his arraignment is Legitimo modo acquietatus: But in the caſe at the Bar, the Grand Jury who indicted one William Price for the murther of Hugh ap William, the Jury who upon Not guilty pleaded, convicted him, were charged in the Star-Chamber for Conſpiracy againſt him, and indicted and convicted, which manner of complaint was never ſeen before; for if the party ſhall not have a Conſpiracy againſt the Indictors, when the Priſoner is acquitted upon his Indictment; à multo fortiori when he is lawfully convict, he ſhall not charge neither the Grand Inqueſt by whom he was indicted, nor the Jury who found him guilty: For the Law in ſuch caſe doth not give any Attaint, for this that he was indicted by the Oath of twelve men at the leaſt, and found guilty by twelve. And in theſe Caſes, the King is the ſole party to the proceedings againſt the Priſoner: But on the other ſide, when a Jury hath acquitted a Felon or Traitor againſt manifeſt proof, there they may be charged in the Star-Chamber for their partiality in finding a manifeſt Offendor not guilty, Ne maleficia remanerent impunita. And it will be a cauſe of infinite vexation and occaſion of perjury and ſmothering of great Offences, if ſuch averments and ſuppoſals ſhall be admitted after ordinary and judicial proceeding: And it will be a means Ad deterrendos & detrahendos juratores a ſervitio Regis.

vaughans rep. pag.

3. It

3. It was reſolved that the ſaid Barker who was Judg of Aſſiſe, and gave judgment upon the verdict of death, againſt the ſaid W.P. and the Sheriff who did execute him according to the ſaid Judgment, nor the Juſtices of Peace who did examine the Offendor, and the Witneſſes for proof of the murther before the Indictment, were not to be drawn in queſtion, in the Star-Chamber, for any Conſpiracy, nor any witneſs, nor any other perſon ought to be charged with any Conſpiracy in the Star-Chamber, or elſewhere, when the party indicted is convicted or attaint of Murther or Felony: and although the Offender upon the indictment was acquitted, yet the Judg, be Judg of Aſſize, or a Juſtice of Peace, or any other Judg, being Judg by Commiſſion and of Record, and ſworn to do Juſtice, cannot be charged for Conſpiracy, for that which he did openly in Court as Judg or Juſtice of Peace: And the Law will not admit any proof againſt this vehement and violent preſumption of Law, that a Juſtice ſworn to do Juſtice will do injuſtice, but if he hath conſpired before out of Court, this is extrajudicial, but due examination of Cauſes out of the Court, and enquiring by teſtimonies & ſimilia, is not any conſpiracy, for this he ought to do; but ſubornation of Witneſſes, and falſe and malicious proſecutions out of Court, to ſuch whom he knows will be Indictors, to find any guilty, &c. amounts to an unlawful Conſpiracy.

And if Records are of ſo high a nature, that for their ſublimity they import verity in themſelves; and none ſhall be received to aver any thing againſt the Record it ſelf. And in this point the Law is founded upon great reaſon, for if the Judicial matters of Record ſhould be drawn in queſtion, by partial and ſiniſter ſuppoſals and averments of Offenders, or any on their behalf, there will never be an end of Cauſes: But Controverſies will be infinite, & infinitum in jure reprobatur: And for this it is adjudged in the 47 Ed. 3. 15. That a Judg who hath a Commiſſion, viz. That is of Record, ſhall not be charged in Conſpiracy; which is to be underſtood of what he did in Court, for the reaſons and cauſes aforeſaid: And with this agrees the Book, 21 Ed. 4. 67. & 27 Aſſ. pl. 12. And the reaſon is for this, that the party is acquitted; and the accuſing ſtands with the Record: And accordingly was the Law taken in this caſe: But in a Hundred Court, or other Court which is not of Record, there averment may be taken againſt their proceedings, for that it is no other than matter in Pais and not of Record; as it appears in the 47 Ed. 3. 15. Alſo one ſhall never aſſign for Error againſt that which the Court doth as Judges, as to ſay that the Jury gave Verdict for the Defendant, and the Court did enter it for the Plaintiff, or to ſay that the party who levied the Fine was dead before the Fine was levied, or ſuch like; Vide 1 H. 6. 4. 39 H. 6. 52. 7 H. 7. 11 H. 7. 28. 1 Mar. Dyer 89. But in a Writ of falſe Judgment, the Plaintiff ſhall have direct averment againſt that which the Judges in the inferior Court, have done as Judges, Quia Recordum non habent, and with this accords 21 H. 6. 34. And as a Judg ſhall not be drawn in queſtion in the Caſes aforeſaid, at the ſuit of the parties, no more ſhall he be charged in the ſaid Caſes before any other Judg at the ſuit of the King: And for this in the 27 Aſſ. pl 18. One was indicted and arraigned at the ſuit of the King, as he was a Juſtice of Oyer and Terminer, where certain perſons were indicted of Treſpaſs before him, he made an entry of Record, that they were indicted of Felony: and it was adjudged that this Indictment was againſt the Law for this, that he was a Juſtice by Commiſſion, and that is of Record: And this preſent act ſhall be to defeat the Record, hoc eſt, to aver againſt that which he did as Judg of Record, which cannot be by the Law, Vide 27 Aſſ. pl. 23. 2 R. 3. 9. 28 Aſſ. pl. 21. 9 H. 6. 60. And it was ſaid, that it was the caſe of one Nudigate, who as a Juſtice of Peace had recorded a force upon a View, which

Averment.

which he did as Judg upon Record; and a Bill was exhibited againſt him in this Court, for this, that he had falſely made a Record, where indeed there was not any Force: And by the opinion of Catlyn and Dyer, chief Juſtices, it was reſolved, that, That thing that a Judg doth as Judg of Record, ought not to be drawn in Queſtion in this Court.

Note well, that the ſaid matters at the Bar were not examinable in the Star-Chamber: And for this it was ordered and decreed by all the Court, that the ſaid Bill without any anſwer to it, by the ſaid Richard Barker ſhall be taken off the File and cancelled, and utterly defaced: and it was agreed, that inſomuch as the Judges of the Realm have the adminiſtration of Juſtice under the King to all his Subjects, they ought not to be drawn into Queſtion for any ſuppoſed corruption, which extends to the annihilating of a Record, or of any judicial proceedings before them, or tending to the ſlander of the Juſtice of the King, which will trench to the ſcandal of the King himſelf, except it be before the King himſelf; for they are only to make an account to God and the King, and not to anſwer to any Suggeſtion in the Star-Chamber; for this would tend to the ſcandal and ſubverſion of all Juſtice. And thoſe who are the moſt ſincere, would not be free from continual Calumniations, for which reaſon the Orator ſaid well, Invigilandum eſt ſemper, multæ inſidiæ ſunt bonis.

And the reaſon and cauſe why a Judg, for any thing done by him as Judg, by the authority which the King hath committed to him, and as ſitting in the ſeat of the King (concerning his Juſtice) ſhall not be drawn in Queſtion before any other Judg, for any ſurmiſe of corruption, except before the King himſelf, is for this; The King himſelf is De jure, to deliver Juſtice to all his Subjects: And for this, that he himſelf cannot do it to all perſons, he delegates his power to his Judges, who have the cuſtody and guard of the Kings Oath.

And forasmuch as this concerns the honour and conſcience of the King, there is great reaſon, that the King himſelf ſhall take account of it, and no other.

And Thorp who was drawn in queſtion for corruption, before Commiſſioners, was held againſt the Law, and upon that he was pardoned; and it is contained in the ſame Record, Quod non trahitur in exemplum. Vide the concluſion of the Oath of a Judg. Vide the Chronicle of Stow 18 Edw. 3. 312.

Note, Thomas Weyland Chief Juſtice of the Common-Bench, Sir Ralph Hengham Juſtice of the Kings Bench: and the other Juſtices were accuſed of Bribery and Corruption, and their Cauſes were determined in Parliament, where ſome were baniſhed, and ſome were fined and impriſoned.

Vide 2 Ed. 3. fol. 27. That the Juſtices of Trayl-Baſton (ſo called for their ſummary proceeding) were in a manner Juſtices in Eyre: And their authority was founded upon the Statute of Ragman, which you may ſee in the old Magna Charta. Vide the form of the Commiſſion of the Trayl-Baſton, Hollingſhed, Chron. fol. 312. And note, it appears by the ſaid Preſident and Chronicle, that the King did examine the corruption of his Judges, before himſelf in the Parliament, and not by force of any Commiſſion.

Abſurdum eſt affirmare, re credendum eſſe non Judici.

An Oath before an Eccleſiaſtical Judg Ex officio.

The Ordinary cannot enforce a man to anſwer general Articles *Ex Officio.*

NOte, Paſch. 4. Jacobi, In the time of the Parliament the Lords of the Council of Whitehall, demanded of Popham chief Juſtice, and my ſelf, upon motion made by the Commons in Parliament, in what caſes the Ordinary may examine any perſon Ex officio upon Oath; and upon good conſideration and view of our Books, we anſwered to the Lords of the Council at another day in the Council Chamber.

1. That the Ordinary cannot conſtrain any man Eccleſiaſtical, or Temporal, to ſwear generally to anſwer to ſuch Interrogatories as ſhall be adminiſtred unto them, but ought to deliver to him the Articles upon which he is to be examined, to the intent that he may know whether he ought by the Law to anſwer to them: And ſo is the courſe of the Star-Chamber and Chancery; The defendant hath the Copy of the Bill delivered unto him, or otherwiſe he need not to anſwer to it.

2. No man Eccleſiaſtical or Temporal ſhall be examined upon ſecret thoughts of his heart, or of his ſecret opinion: But ſomething ought to be objected againſt him what he hath ſpoken or done: No Lay-man may be examined *Ex officio*, except in two cauſes, and that was grounded upon great reaſon: for Lay-men for the moſt part are not lettered, wherefore they may eaſily be inveigled and entrapped, and principally in Hereſie and Errors: And this appears by an Ordinance made in the time of Ed. 1. Title Prohibition.

Raſtal, the words of which Ordinance are, And *Quod non permittant, quod, aliqui Laici in balliva ſua in aliquibus locis conveniant, ad aliquas recognitiones per juramenta ſua faciendas, niſi in cauſis Matrimonialibus & Teſtamentariis.* And the reaſon that the Eccleſiaſtical Judg ſhall examine them in theſe two Caſes, is for this; that Contracts of matrimony, and the Eſtates of the dead are many times ſecret: And they do not concern the ſhame and infamy of the party, as Adultery, Incontinency, Uſury, Simony, hearing of Maſs, Hereſie, &c.

And for this cauſe in theſe caſes and ſuch like, the Eccleſiaſtical Judg ought not to examine Partem ream, upon their Oath; for as a Civilian ſaid, that this was Inventio Diaboli ad deſtruendas miſerorum animas ad infernum: And in the Regiſter, fol. 36. 6. There is a Prohibition in this form, Præcipimus tibi quod non permittas quod aliqui laici ad citationem talis Epiſ. aliquo loco conveniant de cætero ad aliquas recognitiones factas vel ſacramenta præſtanda (the one is the expoſition of the other) niſi in caſibus matrimonialibus & teſtamentariis: And there is an attachment upon it, Pone per vad. talem Epiſc. quod ſit coram Juſticiariis noſtris, &c. oſtenſurus quare fecit ſummoneri, & per cenſuras Eccleſ. diſtringi laicas perſonas vel laicos homines & fœminas ad comparendum coram eo ad præſtandum juramentum pro voluntate ſua ipſis invitis, in grave Coronæ præjudicium & dignitatis noſtræ Regiæ, nec non contra conſuetudinem Regni noſtri: Et habeas ibi Nomina plegiorum, &c. Teſte, &c. by which it doth appear that this was not only againſt the ſaid Ordinance, but alſo againſt the cuſtom of the Realm, which hath been time out of mind, but alſo in prejudice of the Crown and dignity of the King: And with this agrees F.N.B. fol. 41. And Vide the caſe reported by the Lord Dyer (but the caſe is not printed) Trin. 10. Eliz. one Leigh an Attorney of the Common pleas, was committed to the Fleet by the high Commiſſioners, in a cauſe Eccleſiaſtical, for this, that he had been at Maſs, and refuſed to ſwear to certain Articles to be propoſed to him. And although in ſuch caſe, Eccleſiaſtical Juriſdiction is ſaved by the Statute of 10 Eliz. yet they ought not in ſuch caſe to examine upon his Oath: And hereupon he was delivered by all the Court of Common Pleas upon the return of the matter upon a habeas corpus.

Note the delivery out of Priſon, was becauſe the high Commiſſion had no power to impriſon, ſee 2 Inſt. 333.

And

And in Mich. 18 Eliz. Dyer fol. 175. in Hinds caſe, who would not ſwear Commiſſionariis Eccleſ. ſuper articulos pro uſura, & ea de cauſa commiſſus eſt Gaolæ de le Fleet, He was delivered by Habeas corpus per totam curiam, This alſo was becauſe they could not impriſon.

Vide le Statute. 25 H.8. cap. 14. Which is declaratory as to this point: It ſtandeth not with the right order of Juſtice nor good equity, that any perſon ſhould be condis and put to the loſs of his life, good Name, or Goods, unleſs it were by due accuſation, and Witneſſes, or by preſentment, verdict, confeſſion, or proceſs of Out-lawry, &c. And it is not reaſonable that any Ordinary, upon ſuſpition conceived of his own fantaſie, without due accuſation or preſentment, ſhould put any Subject of this Realm in infamy and ſlander of Hereſie, to the peril of life, loſs of good Name, or Goods; (Et paulo ante) the moſt expert and beſt learned man of this Realm, diligently laying wait upon himſelf, cannot eſchew and avoid penalty and danger, &c. and if he ſhould be examined upon ſuch captious interrogatories, as is and hath been accuſtomed to be miniſtred by the Ordinaries of this Realm, in caſe where they will ſuſpect any man of Hereſie: And this was the Judgment of all the ſaid Parliament, ſee F.N.B. Juſtice of Peace 72 Lamb. in his Juſtice of Peace 338 Crompt. in his Juſtice of Peace 366. In all which it appears that if any be compelled to anſwer upon his Oath, where he ought not by the Law, that this is oppreſſion and puniſhable before a Juſtice of Peace, a Juſtice of Aſſize, &c. For this is an Article of charge; to enquire of all Oppreſſions: And as to that which was objected, that for a very long time, divers had been examined upon Oath in Eccleſiaſtical Courts: As to this it was anſwered, that it might very well be, and not againſt Law, for the words of the Treatiſe or Ordinance, and of the Regiſter, are, Contra voluntatem eorum, &c. So that if any aſſent to it, and take it without exception, that is not Contra voluntatem eorum, but to enforce any to take it, who ought not to take it by the Law, is a great oppreſſion: But if any perſon Eccleſiaſtical, be charged with any thing which is puniſhable by our Law, as for uſury, there he ſhall not be examined upon Oath, for this, that his Oath is evidence againſt him at the Common Law, and to do it incurs the penalty of the Statute, but witneſſes may be cited to teſtifie, Regiſter, title Conſult. F.N.B. 53 d. Alſo by the Statute 2 H.4. cap. 15. it is provided, that Dictus Dioceſanus per ſe vel per Commiſſarios ſuos contra hujuſmodi perſonas, &c. Et ad omne juris effectum, publice & judicialiter procedat & negotium hujuſmodi, &c. terminet juxta Canonicas functiones, which words, Juxta Canonicas functiones gives them power to proceed according to their Canons, and excludes the Common Law, and by pretext of this in the caſes mentioned in the ſaid Act, they examine as well Lay-people as Clerks, upon their Oaths concerning Hereſie, erroneous opinions, &c. mentioned in the ſaid act in the Reign of H.4. H.5. H.6. Ed.4. R.3. H.7. unto the time of the ſaid act of 25 H.8. and for this in the Reign of H.8. nor in the Reign of Ed.6. no Lay-man was examined upon his Oath, except in the ſaid two Caſes of Matrimony and Wills: But in the Reign of Queen Mary, this Act of 2 H.4. was revived, and then all the Martyrs who were burnt, were examined upon their Oaths: And afterwards by the 10 Eliz. the ſaid Act of 2 H.4. is repealed, by which the Common Law is in full force and effect: And for this cauſe all the pretence of poſſeſſion and practice which the Eccleſiaſtical Courts have had, is ſtrongly anſwered by this which hath been ſaid, that the words of the ſaid Treatiſe and Regiſter are; Contra voluntatem eorum, &c. And thoſe who have ſo taken it, have aſſented to it, and that ſtands with Law.

Mat. Paris 225, 226, 227, &c. Note, that King John after he had murthered his Nephew Arthur, and Niece Ellenor, the Iſſues of his elder Brother Geffrey, after he had loſt Normandy, Aquitaine, and Anjou, after that his Commons for unjuſt vexation diſobeyed him, his Nobles revolted from him, the Clergy oppreſſed by him, and that he ſtood excommunicated by the Pope, and his Kingdom interdicted, he for his protection granted by his Charter of 13 Maii Anno Regni 14. ſubmitted himſelf to the obedience of the Pope: And after in the fourteenth year of his Reign, as one deſtitute of all ſuccour and ſafety, and from day to day in fear to loſe his Crown, by another Charter he reſigned his Crown and Realm to the Pope Innocent, and his Succeſſors, by the hands of Pandolph his Legate, and took it of him again to hold of the Pope, which was utterly void, for this, that the Dignity is an inherent, inſeparable to the Royal Blood of the King, and deſcendable to the next of blood of the King, and cannot be transferred to another, no more than a Duke, or Earl, or Baron, or other Dignity may transfer over their Dignity, for theſe are incidents inſeparable: Alſo the Pope was an Alien born, and therefore was not capable of Inheritance within England: By colour of which ſubmiſſion and reſignation, the Pope and his Succeſſors exacted great ſums of the Clergy and Laity of England, pro commutandis pœnitentiis, to maintain the height and dignity of the Pope. And for the better inriching of the Coffers of the Pope, Pope Gregory the Ninth ſent Otho Cardinalis de carcere Tulliano, into this Realm, when there was indignation betwixt H. 3. and his Nobles, to collect money for the Pope, who did collect infinite ſums of money, ſo that it was ſaid of him, Quod Legatus ſaginatur bonis Angliæ, which Legate held his Council at London, Anno Dom. 1237. & 22 H. 3. And for the better finding out Offences which ſhould be redeemed with money, he with the aſſent of the Biſhops of England there aſſembled, made divers Canons, amongſt which one was Jusjurandum Calumniæ in cauſis Eccleſiaſticis cujuſlibet, & de veritate dicenda in ſpiritualibus quoque ut veritas facilius aperiatur & Cauſæ celerius determinentur Statuimus de Cætero præſtari in Regno Angliæ ſecundum Canonicas & legitimas Sanctiones, obtenta in contrarium Conſuetudine non obſtante, &c.

By which Canon, it appears that the Law and Cuſtom of England was againſt this examination of the party Defendant upon his Oath, for it is ſaid Statuimus de Cætero præſtari in Regno Angliæ, ſo that this was a new Law, and took its effect De cætero.

2. Obtenta in contrarium Conſuetudine non obſtante. And this very well agrees with the Regiſter and the ſaid Treatiſe De Regia prohibitione, and the other Authorities, That the Law and Cuſtom of England was, that Lay-people in criminal cauſes, be they Eccleſiaſtical or Temporal, ſhall not be examined upon their Oath (only in cauſes matrimonial and teſtamentary) otherwiſe it is of Clerks, as is aforeſaid: And for this, that it appears by the ſaid Canon it ſelf, that this was againſt the Law and Cuſtom of England, whence it follows that this Canon ſhall not bind, for that the Law and Cuſtoms of England cannot be changed without an Act of Parliament, for this, that the Law and Cuſtom of England is the Inheritance of which he cannot be deprived without his aſſent in Parliament: And it appears in Linwood, cap. jure jurandi, fol. 8. 6. That Boniface Biſhop of Canterbury, An. 1272. & 57 H. 3. a little before the death of that King, made this Canon, Statuimus quod Laici de ſubditorum peccatis & exceſſibus corrigendis per prælatos & judices eccleſiaſticos inquiratur ad præſtandum de veritate dicenda ſacramentum per excommunicationis ſententias. Si opus fuerit compellantur impedientes, vero ne hujuſmodi juramentum præſtetur per interdict. eſt excommunicatio ſententia arceantur. In which Canon, it is to be obſerved,

obſerved, that this extends to Lay-people; for, as appears, the Eccleſiaſtical Judg may examine thoſe of the Clergy upon their Oaths; And note, Linwood cap. jure jurando, fol. 6. littera E. ſaith ſo, Hæc dicitur cauſa éditionis hujus Statuti, viz. Prælati Eccleſiaſtici procedebant ad inquirendum de criminibus & exceſſibus ſubditorum ſuorum, & laici (nota hic) ſuffulti poteſtate dominorum Temporalium in hujuſmodi inquiſitionibus noluerunt juráre de veritate dicenda.

Note well what the cauſe was, why Lay-people refuſed to be examined for Crimes and Exceſs.

2. It appears, that the Judges of the Common Law, by their Prohibition did interdict, &c. as it appears by the Regiſter and the other authorities, in the time of Ed. 1. and other Kings, Incroachments were made upon the Subjects which are here called Impediments, but now the Canon ſaith, Impellat.

3. That where by the Law they may examine Lay-people upon their Oath, In cauſis matrimonialibus & teſtamentariis: Here Boniface makes this Canon to extend to Peccata & exceſſus, which Canon was utterly againſt the Law and cuſtom of England. In like manner another was made by him at the ſame time, Linwood cap. de benef. fol. 231. which Canon being made directly againſt the Judges, who did award Proceſs againſt them, if they did impoſe any pecuniary pain: And prohibits them the Judges without fear of excommunication, the Canon being againſt Law, prohibits them notwithſtanding this thundring of Excommunication in all ages. And the ſcope and purpoſe of the ſaid Canon was to perplex the Subjects, and to enrich themſelves by puniſhment pecuniary: And this is declared by act of Parliament made 9 Ed. 2. called Articuli Cleri. Si Prælati imponant Pœnam pecuniariam alicui pro peccato, &c. Regia prohibitio locum habet.

Trin. 5. Jacobi.

NOta, The Law ſo regards the Weal-publick, that although that the King ſhall have the Suit ſolely in his name for the redreſs of it, yet by his pardon he cannot diſcharge the Offender, for this, that it is not only in prejudice of the King, but in damage of the Subjects: for the avoiding of infinite Suits they cannot have private actions, and for that reaſon the Suit is given to the King, not only for himſelf, but alſo for all his Subjects, as if a man ought to repair a Bridg, and for default of reparation it falls into decay; in this caſe the Suit ought to be in the name of the King, and the King is ſole party to the Suit, but for the benefit of all his Subjects. And for this, if the King pardon it, yet the Offence remains; and in any Suit in the name of the King, for redreſs of it, the Offender ought (notwithſtanding the pardon) to make and repair the Bridg for the benefit of the Weal-publick, but peradventure the pardon ſhall diſcharge the Fine for the time paſt: And with this agrees, 37 H. 6. 4. 6. Plow. Com. in Nicols caſe 487. where the words of the Law are; If a Bridg or a High-way is repairable by the Subject, and is in decay, the pardon of the King ſhall not excuſe him which ought to do it, for this, that the other Subjects of the King have intereſt in it. But note, if the pardon in ſuch caſe ſhall diſcharge the Fine, but only for the time before the pardon: But for the time after the pardon, without queſtion the Offender for his default ſhall be fined and impriſoned, the ſame Law, & a multo fortiori

Bonum publicum.

fortiori in caſe of Depopulation; for this is not only an Offence againſt the King, but againſt all the Realm, for by this the Realm is infected, idle and diſſolute people which are Enemies to the Common-Wealth abound: And for this cauſe Depopulation and diminution of Subjects is a greater nuſance and offence to the Weal-publick, than the hindrance of the Subjects in their good and eaſie paſſage by any Bridg or High-way: And for this, notwithſtanding the pardon of the King, he ſhall be bound to re-edifie the houſes of Husbandry which he hath depopulated, but peradventure for the time before the pardon he ſhall not be fined, but for the time after without doubt he ſhall be fined and impriſoned, for the Offence it ſelf cannot be pardoned, as in the caſe of a Bridg or High-way; Quia eſt malum in ſe: But this continues as to the Fine and Impriſonment at all times after the Pardon: But the penalty inflicted by the Statute that may be diſcharged, Quia prohibitum. Vide 3 Ed.3. tit. Aſſ.443. Where an Abbot was bound to repair a Bridg by Preſcription, and after the King by his Charter diſcharged him, which Charter was allowed in a Quo warranto. And after the Abbot was indicted at the Suit of the King, for default of reparation of the ſaid Bridg, and he pleaded the ſaid Charter and allowance: And notwithſtanding it was adjudged that he ſhould repair the ſaid Bridg, for this, that although the Suit be in the name of the King for the Offence, yet the King cannot diſcharge it, for this, that it ſhall be no prejudice and damage of his Subjects: But when the King chargeth his Subjects for the making of a Bridg, or Cauſe, or Wall, &c. there the King may diſcharge in the Pontage, Murage, &c. But when one is bound by Preſcription or Tenure, &c. to repair a Bridg, &c. there the King cannot diſcharge it. And all this appears in the ſaid Book.

Vid. 35. H.6. 29. per Forteſcue, & 16 Ed.3. grant 53.

And note, If one be bound to the King in a Recognizance for to keep the Peace againſt one, and other the Liege people of the King; in this caſe the King, before the Peace broken cannot pardon and releaſe the Recognizance, as it is agreed in 11 H.4. 43. 37 H.6. 4. 1 H.7. 10. And the reaſon is, although the Recognizance be made to the King ſolely, yet inaſmuch as this is made for the benefit and ſafety of the Subjects of the King, in ſuch caſe it cannot be diſcharged.

Note, no licence can be made to do any thing that is Malum in ſe, but Malum prohibitum, 11 H.7. 11. 3 H.7. 39 H.6. 39.

Trin. 5. Jacobi.

Commiſſions.

NOte, Commiſſions in Engliſh under the Great Seal were directed to divers Commiſſioners within the Counties of Bedford, Bucks, Huntington, Northampton, Leiceſter, and Warwick, to enquire of divers Articles annexed to it: And the articles were alſo in Engliſh, to enquire of Depopulation of Houſes, converting of arable Land into Paſture, &c. But the Commiſſioners ſhould not have any power to hear and determine the ſaid Offences, but only to enquire of them: And by colour of the ſaid Commiſſions, the ſaid Commiſſioners took many Preſentments in Engliſh, and did return them into the Chancery, and after, Scil. Trin. 5. Jac. it was reſolved by the two chief Juſtices, and by Walſmley, Fenner, Yelverton, Williams, Snigg, Altham, and Foſter, that the ſaid Commiſſions were againſt Law for three cauſes.

1. For this, that they were in Engliſh.

2. For

2. For that the Offences enquirable were not certain within the Commission it self, but in a Schedule annexed to it.

3. For this, that it was only to enquire, which is against Law, for by this a man may be unjustly accused by Perjury, and he shall not have any remedy, for this, that it is not within the Statute of 5 Eliz. &c. Also the party may be defamed, and shall not have any traverse to it, such a Commission may be only to enquire of Treason, Felony granted, &c. And no such Commission ever was seen to enquire only.

At the Common Law, Assises were not taken but before Justices in Eyre (who sit virtute Brevis, every seventh year, vide Britton fol. 1. and Bracton lib. 5. & 11.) or in the Common Pleas: And this being a great molestation and trouble to the Recognitors of Assise, which Writ for the most part was in use, for the ease of the Country, and expedition of Justice; it was provided by Magna Charta, cap. 12. Quod recognitiones de nova disseisina, & de mor. de ancestor, non capiuntur nisi in suis Comitatibus, & hoc modo: Nos, vel (si extra regnum fuerimus) Capitales Justiciarii nostri mittent justiciarios nostros per unumquemque Comitatum semel in anno, qui, &c. capiant in Comitatibus illis Assisas predictas. And after was the Statute of Westminster 2. c. 30. made, and by this it is provided, Quod assignentur duo Justiciarii jurati, coram quibus & non aliis capiantur assisa, &c. ad plus per annum. By which Act, Justices of Nisi prius were constituted of other Pleas, as well of one Bench as the other, Coram quibus Justiciariis & societate (viz.) Coram duobus Justiciariis vel uno milite, &c. And by the same act the Justices of Nisi prius have power to give judgment, &c. in Assises of Darrain presentment, and Quare Impedit, then came the Statute of 21 Ed. 3. De Finibus, cap. 4. and provided Quod inquisitiones & recognitiones capiantur tempore vacationis, generally before aliquo Justiciario de utroque banco, coram quibus placitum deduct. fuerit associat. sibi, &c. And after by the Statute of York, cap. 3. It is provided, that in plea of Land the Nisi prius shall be taken before one of the Justices, where the Plea, &c. and Chapter 4. That no other Pleas moved by Attachment, or distress shall be taken before any Justice, either of the one Bench or the other generally, be the Plea before them or not, &c. by the Statute 14 Ed. 3. cap. 15. Nisi prius may be taken in any Plea, real or personal before two, so that the one be a Justice of the one Bench, or a chief Justice, or a Serjeant sworn.

By the Statute De finibus, cap. 3. Justiciarii ad assisas capiendas assignati deliberant Gaolas in Comitatibus illis sive infra libertates quam extra de prisonariis quibuscunque, Vide le recitat. del Statute of 28 Ed. 1. de appellatis, which recites the Statute de felonia, &c but not that Felony includes Trespass in ancient time, vide Stamf. 57. The Statute of 3 H. 3. cap. 7. gives power to Justices of Assise to hear and determine Treason, concerning false money: The Statute of 14 H. 6. cap. 1. provides that Justices of Nisi prius have power in all the cases of Felony and Treason to give their Judgment as well where the party is acquitted of the Felony or Treason, as where he is attaint, and to award execution, &c.

The Statute of 28 Ed. 1. De appellatis gives power to Justices of Assise to trie the appeals of approvers.

Justices of Assise by the Statute 34 & 35 H. 8. cap. 14. May write to the Clerk of the Crown De banco Regis, to certifie the first conviction in their own name; but where Justices of one County or Circuit write to other to certifie the attainder of a Principle, the best form is in the name of the King, 2 & 3 Ed. 6. cap. 24.

By the Statute De Articulis super chartas, c. 10. & 4 Ed. 3. c. 11. & 7 R. 2. Justices of Assise may hear and determine Conspiracies, false informations, and Mal-procurers of Inquests and Juries to any Plaint, without

Writ

Writ and without delay, and of Confederacies, and Champerties, and Maintainers, Bearers, and Alliances by Bond, &c.

By the Statute of Northampton, 2 Ed.3. cap.3. Justices of Assise have power to hear and determine the Statute concerning Armor; also to punish the Justices of Peace, and others, who have not done their Office in such like cases, &c.

Justices of Assise ought twice in the year to proclaim the Statute, 32 H.8. and other Statutes against unlawful Maintenance, Champerty, Imbracery, and unlawful Retainers.

By the 3 H.7. cap.1. Justices of Assise take Bail of him who is acquit of Murther within the year, to answer the appeal of the party.

By 33 H.8. Justices of Assise cause the Statute against unlawful games, to be proclaimed in their Circuit.

Justices of Assise make execution of the Statute, 13 H.4. cap.7. of Riots made in their presence, upon pain of a hundred pound, and by 2 H.5.c.8. Commission shall be awarded to enquire of the default of Justices of Assise and of the Peace.

By the Statute of Westminster 2. cap.37. & 2 Ed.3. cap.5. Justices of Assise ought to enquire of return or not return of Sheriffs.

Justices of Assise to enquire of all points of the Statute of 23 H.6.c.10. concerning Sheriffs, under-Sheriffs, and their Clerks, Cozoners, Stewards of Franchises, Bayliffs and Guardians of Prisons, for their extortion, and for delivering of them who are not bailable, and for detaining those who ought to be bailed, 2 Mar. Dyer 99, Justices of Assise held plea in appeal of Murther, by W. 2. & 3. H.7. and of Robbery by Commission for Gaol-delivery.

23 Ed.3. cap. Justices of Assise may enquire of default, &c. of punishment of Victuallers, &c. who sell at unreasonable prices.

Note, Justices of Oyer and Terminer cannot by this authority enquire but of such, who are indicted before themselves, for their Commission is, Ad inquirendum, audiendum, & terminandum: But Justices of Gaol-delivery may arraign a Prisoner indicted before others, the words of their Commission are, Ad Gaolas, Gaolam de B. de prisonaribus in ea existentibus hac vice deliberandum secundum leges, &c. Brook Title Commission, 3 Mar. 24. 4. Ed. 3. c.2. That Justices of Gaol-delivery, deliver Prisoners indicted before the Guardians of the Peace. And by the Statute of 1 Ed.6. cap.7. New Commissioners of Gaol-delivery; But this doth not extend to Indictments, or conviction before the Commissioners of Oyer and Terminer: And the reason of this, is for this, that the indictments and proceedings before Justices of Oyer and Terminer, after the Oyer determined, ought to remain in the Kings Bench: And the Records before Justices of Gaol-delivery, remain with the Custos Rotulorum, vide Brook, Title Commission 12. 38 H.8. Title Oyer and Terminer, 44 Ed.2. 31.

19

Customs, Subsidies, and Impositions.

NOte, upon conference between Popham chief Justice, and my self, upon a judgment given lately in the Exchequer, concerning the imposition of Currants: And upon considerations of our Books, and of Statutes to this purpose: It appeared to us that the Rule of the Common Law is the Register, Title Ad quod dampnum, and F.N.B 222. A. quod patria magis solito non oneretur seu gravetur; Also there is another Rule, that the King may charge his people of this Realm without special assent of the Commons, to a thing which may be of profit to the Common people, but not to their charge; as is held in the 13 of H.4. 16. Et Statutum de Tallagio non concedendo, Nullum Tallagium, seu Auxilium per nos, seu heredes nostros ponatur seu levetur absque voluntate & assensu Parliamenti. Et Magna Charta,

Charta, cap. 30. Omnes Mercatores (nisi publice antea prohibiti fuerint) habeant Salvum & securum conductum abire de Anglia & venire in Angliam, & morari & ire per Angliam, tam per terram quam per aquam, ad emendum & vendendum sine omnibus malis Tolnetis per antiquas & rectas consuetudines, præterquam in Tempore Guerræ, which Statute hath been confirmed more than thirty times by several acts of Parliament, vide le Statute 25 Ed. 1. 3 Ed. 1. in turi. 9 Ed. 3. cap. 1, & 2. 14 Ed. 3. 2. 25 Ed. 3. cap. 2, &c. The effect of which is, that every Merchant of this Realm, or other, may freely buy, sell, and pass the Sea with all their Merchandises, paying the Customs of ancient time used. Quæn Mary put an imposition upon Cloaths, which the 1 Eliz. Dyer 165. was moved and not resolved, vide 31 H. 8. Dyer fol. 43. & 1 Eliz. 165. Magna Custuma & parva Custuma, vide 9 H. 6. 12, & 35. And note there the saying of Babington. Note the 1 Eliz. Dyer 165. there was Antiqua sive magna Custuma at the Common Law, scil. for Wools, Wool-fels, and Leather, and this was equal to strangers as Denizens. And in the time of Ed. 1. a Merchant stranger grants over the said Customs 3 s. 3 d. which is called Nova seu parva Custuma.

Upon all which and divers Records which we had seen, it appeared to us, that the King cannot at his pleasure put any imposition upon any Merchandise to be imported to this Kingdom, or exported, unless it be for advancement of Trade and Traffick, which is the life of every Island, Pro bono publico. As if in forraign parts any imposition is put upon the Merchandises of our Merchants, Non pro bono publico; and for to make equality, for the purpose to advance Trade and Traffick, the King may put an imposition upon their Merchandises, for this is not against any of the Statutes which were made for advancement of Merchandise, or of the Statute of Magna Charta cap. 30. which is, Si aliqui Mercatores, de terra contra nos guerrina inveniantur in terra nostra in principio guerræ attachientur, &c. Quo modo mercatores terræ nostræ tractantur, qui nunc inveniantur in terra illa, contra nos guerrina: Et si nostri salvi sunt ibi, illi salvi sunt in terra nostra; For the end of all such restraints is, Salus populi: And so in the case of Currants, which was now lately adjudged in the Exchequer: Also in the case of Customer Smith, which was adjudged in the Exchequer, in the Raign of Queen Eliz. both the impositions were imposed, upon the said reason to make equality; for this was the truth of both cases (Scil.) The advancement of Trade and Traffick, and for this cause such Impositions were lawful.

And it was clearly resolved by us, that such Imposition so put, cannot be demised or granted to any subject, for this, that it is to augment and decrease, or be quite taken away upon just occasion for advancement of Merchandise. And this was one of the reasons in Customer Smith's Case, that it could not be demised; also it was assessed after the demise.

And although that the King may prohibite any person in some cases with some Commodities to pass out of the Realm, yet this cannot be where the end is private, but where the end is publick, viz. to restrain the person, for this, that Quam plurima nobis & Coronæ nostræ prejudicialia in partibus exteris prosequi intendit, and to restrain any Merchandises either in time of Dearth, or in time of War, For Necessitas est lex temporis.

It appeared unto us also, that at the Common Law no Custom was paid, but only for Wools, Wool-fels, and Leather, which is called in Magna Charta, Recta consuetudo, and all others are there called Mala tolneta, which in the Statute De Tallagio non concedendo, is called Male. And at the beginning of the Raign of Kings, it hath for a long time been used, by authority and consent of Parliament, to grant to the King certain Subsidies

of Tunnage and Poundage, for term of his life, which began in such form, 2 & 3 H.5. in the 31 H.6.cap.8. & 12 Ed.4.cap.3. For the defence of the Realm, and maintenance of certain Wars by Act of Parliament, which proves, that the King by his own power cannot impose it, but by consent of Parliament; but such subsidie of Tunnage and Poundage might be granted by the King so long as he lived; for this, that this is limited and given to the King in certain: But an imposition put for equality, as hath been said, hath not any certain continuance, but is to be augmented, diminished, or taken away, for the benefit of the Common-wealth: And for that cause it cannot be demised, vide 31 H.8. Dyer 43. 1 Mar. D 92. 1 Eliz. D.165. 2 & 3 P. & M. D.128. 12 Eliz. D.296. 23 Eliz. D.375. 45 Ed.3. cap.4. 27 Ass. pl.44. Register 192, &c.

Vide M. Ch. cap.30. they are called Consuetudines & per vocabulum artis, they are called Custuma, vide le Stat. 51 H.3. Title Exchequer in Rastal: It appears that there were ancient Customs, and those were for Wools, Wool-fels, and Leather, vide le Statute 9 Ed.3. cap.2. That all Charters, and Letters Patents made against free Trade and Traffick, made, or to be made, are void.

Vide Fortesc. in his Comment of the Laws of England, cap.3. 6. fol.43. Neque lex per se vel per ministros suos Tallagia, subsidia, aut quævis alia onera imponit Legeis suis, aut leges eorum mutat, vel novas condit sine concessione & assensu totius Regni sui in Parliamento suo expresso, &c. vid.fol.13.cap.9.

And note for the benefit of the Subject, the King may make an Imposition or Toll within the Realm, to repair High-ways, Bridges, and to make Walls for defence: But then the Sum imposed ought to be proportionable to the benefit: And this appears the 13 Hen.4. 16. See the Imposition, for equality ought to be for the publick good, see the Charter 31 Ed.1. which is called Charta mercatoria ex Rot. mercator. an.31 Ed.1. n.42. Patents 3 Ed.1. n.1, & 9. de sacco lanæ dimidium marcæ; lasta coriorum, 1 Mark, &c. Fines. 3 Ed.1. n.24. intus & non in dorso, vide Rot. Parl. an.13. Ed.3. No new Inhansement of Customs without common consent: And in 22 Ed.3. n.8. against new Customs and Impositions, and that Merchants may freely pass, &c. And in the Parliament an.8. H.6. n.29. Amongst the new Impositions granted by H.5. upon Merchandises coming to Burdeaux. And Parliament 28 H.6. n.35. the Duke of Somerset accused for causing the King to grant unto Sir Pierce Bracy an Imposition of Wines.

Parl.9. R.2. n.30. against a Patent made to the Lieutenant of the Tower, by colour of which he took Custom of Wine, Oysters, and other Victuals, to be void.

29 Ed.3. 11.n. Ex Rot. Parliamenti, Subsidie of Wools granted for six years, so as during the same time no other aid or imposition be laid upon the Commons.

Parliament. 5. Ed.3. n.17,18,19. against new Impositions upon Staple Commodities, Parl.22.Ed.3. n.31. against alnage of Worsteds, 5 Ed.3.n.163. against all new Impositions, and 5 Ed.3. n.191. 38 Ed.3. n.26. Rot.Parl. against unreasonable Impositions.

Parl.7 R.2. n.35,36. 9 R.2.n.30. No Impositions or Taxes without consent of Parliament.

Note 2 R.2.Parl.apud Gloucestriam, act.25. Subsidie only for defensive wars, not for invasive, 1 R.2. Parl. accord. 1 R.3. against Benevolence, Vide Claus. 4 Ed.3. n. 22. bis.

In

IN the caſe in the Star-Chamber, betwæn Edwards a Phyſitian Plaintiff, and Wooton Doctor in Phyſick Defendant. Libels. Star-chamb.

The Caſe was, That Doctor Wooton writ to Edmunds an infamous, maſicious, ſcandalous, obſcene Letter, to which he ſubſcribed his name; And this he ſealed and directed, To his Loving Friend Mr. Edward Spæd this: And after the ſaid Doctor publiſhed and diſperſed to others a great number of Copies of the ſaid Letter.

And it was reſolved by the Lord Chancellor Egerton, the two chief Juſtices. & per totam Curiam, that this was a ſubtle and dangerous kind of Libel: For inaſmuch as the writing of a private Letter to another, without any other publication, the party to whom it is directed cannot have an Action Sur le caſe, for this, that no action lies; but when it is publiſhed to others to the ſcandal of the Plaintiff, as it hath been oftentimes adjudged, action lieth.

The Doctor thought that this could not be puniſhed in any manner; But it was reſolved, that the ſaid infamous Letter, which in Law is a Libel, ſhall be puniſhed (although it was ſolely writ to the Plaintiff without any other publication) in the Star-Chamber, for that it is an Offence to the King, and is a great motive to revenge, and tends to the breaking of the Peace and great miſchief: And for that reaſon it was neceſſary, that it ſhould be puniſhed either by Indictment, or in the Star-Chamber, to prevent ſuch occaſions of miſchief. But in the caſe at the Bar, the diſperſing of Copies of it, or the publication of the effect of it, aggravates the Offence, and makes it a new Offence: For, for that alſo the party may have an Action ſur le Caſe.

Note, that by the Civil Law, if any perſon hath diſabled himſelf to bear any Office, or for any other purpoſe made a Libel againſt himſelf, he ſhall be puniſhed for it. And ſo it ſeems to me, he ſhould be in the Star-Chamber: for this is an Offence to the King and the Common-wealth: And without queſtion, although that the Doctor ſubſcribed his name to the ſaid Letter, yet the ſaid Letter importing the ſcandalous matter of a Libel, is in the Law a Libel.

Nota, the Law of the Lydians is, that he who ſlanders another, ſhall be let blood in the Tongue, and he who hears it and aſſents to it, in the Ear, &c.

Mich. 5. Jacobi.

INter Johannem Wooton quer. & Johannem Edwin Defendentem. In Replevin the Defendant avowed, and the Plaintiff demurred, and the Caſe was thus. Reſervation.

William Haws was ſeiſed in Fee of a Meſſuage, and fifty five acres of Land, five acres of Meadow, and ſix acres of Paſture in Fromanton, in the County of Hereford: And 27 Jun. 28 H. 8. by Indenture demiſed the Tenement aforeſaid to Nicholas Trahern for ſeventy nine years, Reddendo inde annuatim prefato Gulielmo Haws & aſſignatis ſuis 26 s. 8 d. at the Feaſts of the Annunciation and St. Michael by even and equal portions: And after the Teſtor died, and the Reverſion deſcended to William his Son, under whom the ſaid John Edwin claimed.

And the ſole point in this caſe was, If the Rent reſerved in this caſe ſhall go to the Heir, or ſhall be determined by the death of the Leſſor, for if the Leſſor had reſerved the Rent to him without more, this ſhall determine by the death of the Leſſor: and the addition of theſe words (And his Aſſigns) ſhall not enlarge the reſervation, for if the Leſſor had aſſigned the reverſion over, yet the Rent ſhall determine by his death, for the Aſſigns cannot have the Rent longer than the Leſſor himſelf ſhould have it; And the Leſſor himſelf hath it but for term of his own life, vide 18 Ed.3. title Aſſ.86. 10 Ed.4.18. 27 H.8. 19. per Audley & vide Hill. 33 Eliz. Rot. 1341. In this Court in a Replevin, inter Richmond & Butcher, where the caſe was, that Butcher avowed for a rent as Heir to his Father, upon a Demiſe made by his Father of certain Lands for one and twenty years, by theſe words, Reddendo & ſolvendo proinde durante predicto termino 21 annorum prefato (Patri) Executoribus & aſſignatis ſuis 10 l. legalis monetæ Angliæ, &c. ad feſta, &c. And it was adjudged, that by this reſervation the Heir ſhould not have the Rent, for that the reſervation was made to the Father, his Executors, and Aſſigns, and not to his Heirs, &c.

Mich. 5. Jacobi.

Corane, Buggary. Nota, Bugrone Italice, *is a Buggerer, and* Buggerare *is to* Buggar, *ſo Buggary cometh of the* Italian *Word.*

The Letter of the Statute of the 25 H.8.cap.6. If any perſon ſhall commit the deteſtable ſin of Buggary with Mankind, or Beaſt, &c. it is Felony, which act being repealed by the Statute 1 Mar. is revived and made perpetual by 5 Eliz. cap.17. And he ſhall loſe his Clergy.

It appears by the ancient Authorities of Law, that this was Felony; but they vary in the puniſhment, for Brit. cap.9. ſaith, that Sorcerers, Sodomers, and Hereticks ſhall be burnt, F.N.B. 269. a. agrees with it: But Flet. lib. 1. cap.35. Pecorantes & Sodomitæ terra vivi ceu ſodiantur. But in the ancient Book called the Mirror of Juſtice vouched in Plow. Com. in Fogoſſes Caſe, the Crime is more high, for there it is called Crimen læſæ Majeſtatis, a ſin horrible, committed againſt the King of Heaven: And this is either againſt the King Celeſtial, or Terreſtrial in three manners, by Hereſie, by Buggary, by Sodomy. Note, that Sodomy is with Mankind, and it is Felony by the Statute of 25 H.8. and therefore the judgment for Felony doth now belong to this offence, viz. to be hanged by the neck till he be dead. To make that Offence Oportet rem penetrare, & ſemen naturæ emittere, & effundere, for the Indictment is Contra ordinationem Creatoris & naturæ ordinem rem habuit veneream, dictumque puerum carnaliter cognovit. Every of which (rem habuit, & carnaliter cognovit) imply penetration and emiſſion of Seed: And ſo it was held in the caſe of Stafford, who was attaint in the Kings Bench and executed. Pæderaſtes amator puerorum, whereof the Greek word is, παιδεραστὴς; Buggary with Boys, Vide Rot. Parl. 50. Ed.3. num.58. complained in Parliament, that a Lumbard did commit the ſin that was not to be named: So in Rape, there ought to be penetration and emiſſion of Seed, vide Stamford fol.44. Which Statute makes it Felony, he who procures, &c. or receives the Offender, &c. is acceſſary.

The

The words of the Statute of West.1. cap.34. If a man ravish a woman 11 H.4. 18. If one aid another to commit Rape, and if he be present, he is principal in the Buggary, vide Lev. 18. 22. & cap.10. 13. 1 Cor.6.

Præmunire. Vid.15 H.7. 9. Præmunire was at the Common Law.

NOte, in the Book of Doctor Colines, intituled, An Answer, &c. to the Abstract, and published 1584. And a Pamphlet now lately published by Doctor Ridley, they would obtrude upon the World, That forasmuch as that now by the act 10 Eliz. cap.1. all Spiritual and Ecclesiastical power within this Realm is annexed to the Crown, and the Law by which they determine causes, which belongs to their Cognizance, is the Ecclesiastical Law of the King: That for that cause no Præmunire lies against any Spiritual Judg for any Cause whatsoever. And some other of their Profession have some other reasons to confirm it.

1. That when the Statute of Præmunire was made, viz. in the Reign of the Kings Ed.3. & R.2. then the Pope usurped Ecclesiastical Jurisdiction, although that De jure it belonged to the King. And therefore forasmuch as the King is as well De facto, as De jure, supream head of all, as well Ecclesiastical as Temporal; now the Cause being changed, the Law is changed also.

2. The conclusion of the Writ of Præmunire is in Domini Regis contemptum & præjudicium, & dictæ Coronæ & dignitatum suarum læsionem & exhæredationem manifestam, & contra formam Statuti, &c. Which proves that the Jurisdictions shall be now severed and united to the Crown; For that which is united to, and derived from the Crown, cannot be said contra Coronam & dignitatem Regis.

3. The Court of high Commission is the Court of the King, and is by force of an act of Parliament, and Letters Patents of the King: And for this, although it may be said, that the Consistory Courts are Curiæ Episcoporum, yet the Court by force of high Commission is the Court of the King: And for that reason their proceedings shall not be subject to Præmunire.

4. This new Court is erected by Act of Parliament, and Letters Patents of the King: And for this, where the Statute of R.2. speaks De Curia Romana seu alibi, &c. This (alibi) cannot extend to a Court erected by Parliament, An.10. Reg. Eliz.

But to these Objections, it was answered and resolved by divers Justices in this very Term, that without question the Statutes 27 Ed.3. 16 R.2, &c. De præmunire, are yet in force: And all such proceedings, by colour of Ecclesiastical Law before any Ecclesiastical Judges who were in danger of Præmunire, before the said act 1 Eliz. are now in case of Præmunire after the said act, be it before the Commissioners by force of high Commission, or before Bishops or other Ecclesiastical Judges: For the said acts of Præmunire are not repealed by the said act 1 Eliz.

And as to the first and second Objections, it was answered, that true it is, that the Crown of England hath as well Ecclesiastical as Temporal Jurisdiction, De jure annexed to it, as appears by the Resolution in Cawdries case, from age to age: And although this was De jure, yet when the Pope became so potent and powerful, he did usurp upon the Kings Ecclesiastical Jurisdiction within this Realm; but this was but mer usurpation (for the King cannot be put out of the possession of any thing which belongs to his Crown.) And for this reason all the Kings of this Realm Totis viribus proinde, for the establishment of their temporal Law, by which they inherit the Crown, and by which they govern their Subjects in Peace, and punish those who are rebellious, or who commit great Offences against them and their Crown: And they were always jealous least any

any part or point of their temporal Law should be incroached upon: And for this, if the Ecclesiastical Law usurp any thing upon the temporal Law, this was severely punished: And the Offender esteemed and adjudged an Enemy to the King by the ancient Statutes; and every one might have killed him before the Statute 5 Eliz. and this is the reason for why: although both Jurisdictions belong to the Crown, yet inasmuch as the Crown it self is directed descendable by the Common Law, and all Treason against the Crown punished by this Law; for this cause, when the Ecclesiastical Judge usurps upon the Common Law, it is said Contra Coronam & dignitatem &c. And all the Prohibitions directed to the high Commissioners from year to year, from the time of the making of the said Statute 1 Eliz. doth conclude, Contra Coronam & dignitatem Regiam.

For as it was resolved by all the Justices, Pasch. 4. Jac. Reg. est contra Coronam & dignitatem Regiam, when any Ecclesiastical Judge doth usurp upon the temporal Law, because, as in all those Writs it appeareth, the interest or cause of the Subject is drawn ad aliud examen, that is, when the Subject ought to have his cause ended by the Common Law, whereunto by birth-right he is inheritable, he is drawn in aliud examen (viz.) to be decided and determined by the Ecclesiastical Law: and this is truly said Contra Coronam & dignitatem Regiam. And this appears by all the Prohibitions (which are infinite) which have been directed to the high Commissioners and others after the said act 1 Eliz. A fortiori, he who offends in a Præmunire shall be said to offend Contra Coronam & dignitatem Regiam: And this in effect answers to all the aforesaid Objections; but yet other particular answers shall be given to every of them.

As to the third, although the Court by force of high Commission is the Court of the King, yet their proceedings are Ecclesiastical: And for this, if they usurp upon the temporal Law, this is the same offence which was before the said act 10 Eliz. For this was the end of all the ancient acts, that the temporal Law shall not in any manner be emblemished by any Ecclesiastical proceedings,

As to the fourth, although it be a new Court, yet the ancient Statutes extend to it within this word Alibi, and divers new Bishopricks were erected in the time of H. 8. And yet there was never any question, but that the ancient Acts of Præmunire extended to them.

But to answer to all the Objections aforesaid, founded upon the said Statute of 1 Eliz. out of the words and meaning of the same act; For whereas the act 1 Eliz. repealed the Statute 1 & 2 P. M. 8. There is an express Proviso in the said act 1 Eliz. that that shall not extend to repeal any clause, matter, or sentence contained or specified in the 1, & 2. P. M. which in any sort toucheth or concerneth any matter or cause of Præmunire: But that all of that which doth touch or concern any matter of Præmunire shall stand in force and effect: And the clause of 1. & 2. P. M. which concerns matter of Præmunire, is such, every person who by any process out of any Ecclesiastical Court of the Realm, or out of it, or by pretence of any Spiritual Jurisdiction, or otherwise, contrary to the Laws of the Land, unquiet or molest any man for any thing, parcel of the possession of any Religious house, shall incur the danger of the act of Præmunire, An. 16. R. 2. which proves that as well the act 1, & 2. P. M. as the act 1 Eliz. which creates the high Commission Court, which refers to the act of 1, & 2. P. M. intends by express words, that the act 16 R. 2. of Præmunire shall stand in force, Also the act of 1 Eliz. revives the act of 25 H. 8. cap. 10. which makes a Præmunire in a Dean and Chapter &c. for not electing, nor certifying, or not admitting of any Bishop elected: by which it is directly proved, that the act 1 Eliz. never intended to take away the offence of præmunire, but expressly provided

provided for it, as appears by that which hath been said.

But then we are to note in what cases a Præmunire lies, in what not. Prima Regula

And for this that it is so penal, it is necessary that it should be explained and made known.

In all Cases, when the Cause originally belongs to the Cognizance of the Ecclesiastical Court, and Suit is prosecuted there, in the same nature as the Cognizance belongs to them (although in truth the cause, all circumstances being disclosed, belongs to the Court of the King, and to be determined by the Common Law) yet no Præmunire lies in that case, but a Prohibition. As if Tythes are severed from the nine parts, and are carried away: if the Parson sue for the subtraction of these Tythes in the Spiritual Court, this is not in the case of Præmunire: for it may be that the Plaintiff did not know that they were severed from the nine parts, nor that they were carried away; Nor may the Ecclesiastical Judg know any thing of it: And although that the Defendant plead this, yet the Ecclesiastical Court may proceed to try the truth of it without danger, vide 10 H.4. 2. according with this opinion; so if a Parson sue for Tithes of Wood, surmising that they were Sylvæ cæduæ, under the age of twenty years, whereas in truth they were above the age of twenty years (in which case by the Statute of 45 Ed.3. Tithes ought not to be paid:) yet a Prohibition lieth and no Præmunire. Regula Prima

But although that the cause originally may appertain to that Cognizance of the Ecclesiastical Judg, yet if he sue for it in the nature of a Suit, which doth not belong to the Ecclesiastical Court, but to the Common law, there a Præmunire lieth, as in the case put before: If the Parson after the severing of Tithes, will in any Ecclesiastical Court within this Realm, sue for carrying away his Tithes severed from the nine parts, which action by matter apparent to the Ecclesiastical Court, appertains to the Common Law; In such both the Actor and the Judge incurs the danger of a Præmunire; And so was it adjudged in 17 H. 8. as Spilman reports it: One Turbervile sued a Præmunire against a Parson, who by citation convened him into the Ecclesiastical Court within this Realm, & there Libell'd against him for taking of Tithes, which were severed from the nine parts, and the Parson was condemned and had Judgment that he should be out of the protection of the King, and forfeit all his Lands, Goods, and Chattels, and his body to perpetual Imprisonment, & damages to the party. So if a Mortuary be delivered to a Parson, and after the party re-take it, if the Parson sue for this as for a Mortuary to him delivered and carried away, he is in case of Præmunire; but after the repriſal, if he sue for it as Mortuary not executed, in nature of a Suit, which belongs to Court Christian: upon the truth of the case there is cause of Prohibition, and no Præmunire lies, vide 10 H.4.2. So the case which hath been put of suit for tithes of Wood, if the Parson sue for tithes of wood above 20. years growth, so that it appears by the Libel, that the Cognizance of this cale doth not belong to Court Christian (viz.) to the Court of the Arch-bishop of Canterbury, the Præmunire lies, as you may see in the Book of Entries, tit. Dismes, fol. 221. But the tit. Prohibition, fol. 449. Divisione Dismes, pl. 2,3,4,5.& 6. if the Suit be Pro sylva cædua, &c. So that as the Suit is framed the Cognizance belongs to Court Christian, although that the truth be otherwise, there a Prohibition lies, and no Præmunire. For when the cause originally belongs to the Cognizance of the Ecclesiastical Court, although that hold plea of any incident to it, Regula secunda.

it, which belongs to the Common Law, there Prohibition and not Præmunire.

Regula tertia.

When the cauſe originally belongs to the cognizance of the common Law, and not to the Eccleſiaſtical Court, there although they libel for it according to the courſe of the Eccleſiaſtical Law, yet the Præmunire lyeth, for this, that this draws the cauſe which is determinable at the common Law, Ad aliud examen, viz. to be decided by the Civil or Eccleſiaſtical Law, and ſo deprives the Subject of the benefit of the common Law, which is his birthright: And with this agrees the Book of Entries, Title Premunire, fol. 229. b. & 430 a. where it is put for a Rule. Quod placita, Querelæ, & poſſeſſiones terrarum & tenementorum tranſgr. debitorum & aliorum conſimilium infra Regnum Angliæ illat. ad dominum Regem ad Regalem Coronam & dignitates ſuas ſpecialiter, & non ad forum Eccleſiaſticum, pertinent. Quidam I. R. &c. machinans Dominum Regem & Coronam & dignitates ſuas exhæredare, & cognitionem quæ ad Curiam Domini Regis pertinent, ad aliud examen infra Regnum ſuum Angliæ in Curam Chriſtianitatis coram V. W. Official. &c. trahere &c. quendam articulum ad proſequendum ipſum R. in eadem Curia Chriſtianitatis coram præfato Officiali pro debito 20 l. & ipſum R. in eadem Curia præfato I. A. inde reſponſum citari, &c. So that if the original cauſe be temporal, although that they proceed by Citation, Libel, &c. in Eccleſiaſtical manner, yet this is in danger of Præmunire; And the reaſon of this Offence is expreſſed in the Writ, for this, that he endeavors to draw Cognitionem quæ ad Curiam Domini regis pertinet ad aliud examen, which is as much as to ſay, that the Debt, the Cognizance whereof belongs to the Court of the King, and to be determined by the common Law, he intends by the Original Suit to draw it to be determined by the Eccleſiaſtical Law.

And note, in the indictment of Præmunire againſt Cardinal Wolſey Mich. 21 H. 8. it is ſaid, Quod prædictus Cardinalis & intend: finaliter antiquiſſimas Angliæ leges penitus ſubvertere & enervare, univerſumque hoc Regnum Angliæ & ejuſdem Angliæ populum, legibus imperialibus vulgo dictis legibus Civilibus & eorum legum Canonibus in perpetuum ſubjugare & ſubjicere, &c. and this is included within theſe words, Ad aliud examen trahere, viz. to decide that by the Civil and Eccleſiaſtical Laws, which is determinable by the common Law: And upon this was a notable caſe in Hil. an. 25 H. 8. the caſe of Nick Biſhop of Norwich, againſt whom, he then being in the cuſtody of the Marſhalſey, the Kings Attorney preferred a Bill of Præmunire. And the matter of the Præmunire was ſuch. Within Thetford in the County of Norfolk hath been De tempore cujus, &c. ſuch cuſtome, that all Eccleſiaſtical cauſes ariſing within that Town, ſhould be determined before the Dean of the ſame Town, who hath within it peculiar Juriſdiction; and that none of the ſame Town ſhall be drawn in plea in any other Court Chriſtian for Eccleſiaſticall cauſes, unleſs before the ſame Dean: And if any be againſt the ſaid Cuſtome drawn in Suit before any other Eccleſiaſtical Judge, and this be preſented before the Major of the ſame Town, that ſuch party ſhall forfeit 6s. 8d. And that an inhabitant of Thetford ſued in the Conſiſtory Court of the ſaid Biſhop, at Norwich for an Eccleſiaſtical cauſe ariſing within the ſaid Town of Thetford, and this was preſented before the Major of Thetford according to the Cuſtom, for which he forfeited 6s. 8 d. the ſaid Biſhop cited the ſaid Major to appear before him at his houſe in Hoxin, in Suffolk, generally Pro ſalute animæ, and upon appearance libelled, Per parole upon all the matter

matter, and enjoyned him upon pain of Excommunication to annul the ſaid Preſentment before a day: And upon a Premunire brought forth for this matter the ſaid Biſhop had Council learned aſſigned him: And they objected, that as well the ſaid Preſentment as the ſaid Cuſtom were for divers cauſes void, and therefore it cannot be ſaid, Contra coronam & dignitatem Regiam, nor hath the Biſhop drawn the party Ad aliud examen. for it ought not to be examined in any Court.

2. They objected, that the Court of the Biſhop was not intended within the act of 16 R. 2. 32. but In Curia Romana aut alibi, and this alibi ought not to be intended out of the Realm, but it was reſolved by Fitz-James chief Juſtice, & per totam curiam; That, be the Cuſtom and Preſentment good or not, this is a temporal thing and determinable by the common Law, and not examinable in the ſpiritual Court; and for this, the Biſhop in this caſe hath incurred a Premunire.

3. That Alibi extends as well to the Courts of the Biſhops, and other Eccleſiaſtical Courts within this Realm, as elſewhere: And ſo the Court ſaid, that it had been often times adjudged, upon which the ſaid Biſhop (the matter of the Indictment being true) confeſſed the ſaid Indictment: And upon this appearing, the ſecondary Juſtice gave Judgment againſt him, that the ſaid Biſhop ſhall be out of the protection of the King, and that his Lands, Goods, and Chattels ſhould be forfeited to the King, and his body to be impriſoned Ad voluntatem Regis &c.

Nicholas Fuller's *Case.*

Eccleſiaſtical Commiſſion.

IN the great caſe of Nicholas Fuller of Grayes Inn, theſe points were reſolved upon conference had with all the Juſtices and Barons of the Exchequer.

1. That no Conſultation can be granted out of the Term, for this, that it is an award of the Court, and is final, and cannot be granted by all the Judges out of the Term, nor by any of them within the Term out of Court: And the name of the Writ, Viz. a Writ of Conſultation, imports this, that the Court upon conſultation amongſt them ought to award it.

2, That the conſtruction of the Statute, 1 Eliz cap. 1. and of the Letters Patents of high Commiſſion in Eccleſiaſtical cauſes founded upon the ſaid Act, belongs to the Judges of the Common Law: For although that the cauſes, the cognizance of which belongs to them, are merely ſpiritual, and the Law by which they proceed is merely Spiritual, yet their authority and power is given to them by Act of Parliament, and Letters Patents: the conſtruction of which belongs to temporal Judges: And for this, the conſultation which was granted is with this reſtraint, Quatenus non agat de authoritate & validitate literarum patentium pro cauſis Eccleſiaſticis vobis vel aliquibus veſtrum direct. aut de expoſitione & interpretatione ſtatuti de anno primo nuper Reginæ, &c. In the ſame manner as if the King hath a Benefice donative by Letters Patents, although that the Function and Office of the Incumbent be Spiritual, yet inaſmuch as he comes to it meerly by Letters Patents of the King, he ſhall not be viſitable nor deprivable by any Eccleſiaſtical authority, but by the chancellor of the King or by commiſſioners under the great Seal.

3. It was reſolved when there is any queſtion concerning what power or juriſdiction belongs to Eccleſiaſtical Judges, in any particular caſe, the determination of this belongs to the Judges, of the common Law; in what caſes they have cognizance, and in what not; for if the

Eccleſiaſtical Judges ſhall have the determination of what things they ſhall have cognizance, and that all that appertains to their Juriſdiction which they ſhall allow to themſelves, they will make no difficulty, Ampliare juriſdictionem ſuam: And according to this reſolution, Bracton Lib 5. tract. de except. cap. 15. fol. 412. Cum judex Eccleſiaſticus prohibitionem a Rege ſuſcepit, ſuperſedere debet in omni caſu, ſaltem donec conſtiterit in Curia Regia ad quam pertinet juriſdictionem; quia ſi Judex eccleſiaſticus æſtimare debet an ſua eſſet juriſdictio, in omni caſu indifferenter procederet, non obſtanti Regia prohibitione, vide Entries. fol. 445. There was a Queſtion, whether Court Chriſtian ſhould have cognizance of a Lamp. And a Prohibition was granted, Quod non procedant in curia Chriſtianitatis, quouſque in curia noſtra diſcuſſum fuerit, utrum cognitio placiti illius ad Curiam noſtram vel ad forum Eccleſiaſticum pertineat. And if the determination of a thing which appears to Court Chriſtian, doth appertain to the Judges of the common Law, the Judges of the common Law have power to grant a Prohibition. And all this appears in our Books. that the Judges of the common Law ſhall determine in what caſes the Eccleſiaſtical Judges have power to puniſh any Pro læſione fidei, 2. H. 4. fol. 10, 11. H. 4. 88. 22 Ed. 4. 20 So of the bounds of Pariſhes in 5 H. 5. 10. 39 Ed. 3. 23. So it belongs to the Judges of the common Law, to decide who ought to certifie excommunication, and to reject the certificate, when the Ordinary or Commiſſary is party, 5 Ed. 3. 88. Ed. 3. 69. 70. 18 Ed. 3. 58. 12 Ed. 4. 9 H. 7. 1. 10 H. 7. 9. For this it was reſolved clearly, that if any perſon ſlander the authority or power of the high Commiſſioners, this is to be puniſhed before the Judges of the common Law, for that the determination of their authority and power which is given to them, by the Statute, and the Letters Patents of the King, belongs to them, and not Court Chriſtian: And for this, that the many Articles objected againſt Fuller concerning the ſlander of their authority and power, was ſolely determinable and puniſhable before the Judges of the common Law. One other reſtraint was added in the Conſultation: Et quatenus non agat de aliquibus ſcandalis, contemptibus, ſeu aliis rebus quæ ad communem legem aut ſtatuta regni noſtri Angliæ ſunt punienda & determinanda.

4. It was reſolved, That if a Counſellor at Law, in his argument ſhall ſcandal the King or his Government, Temporal or Eccleſiaſtical, this is a Miſ-demeaner and contempt to the Court; for this he is to be indicted, fined, and impriſoned, and not in Court Chriſtian: But if he publiſh any Hereſie, Schiſm, or erroneous Opinion in Religion, he may be for this convented before the Eccleſiaſtical Judges, and there corrected according to the Eccleſiaſtical Law; For the Rule is, Quod non eſt jure conſonum quod quis pro aliis quæ in Curiis noſtris acta ſunt, quorum cognitio ad nos pertinet, trahatur in placitum in Curia Chriſtianitatis, as it appears in the Book of Entries, fol. 448. So that the intent is, that Hereſie, Schiſm, or ſuch enormous opinions in Religion, doth not appertain to the Cognizance of temporal Courts: For this cauſe a conſultation was granted, Quoad ſchiſmata, hæreſes, & inormiam, impiam vel pernitioſam opinionem in religione, fide, ſeu doctrina Chriſtiana pie & ſalubriter ſtabilita infra regnum noſtrum Angliæ, quorum cognitio ad forum eccleſiaſticum ſpectat, &c. Vide Mich. 18 H. 8. Rot. 78. In Banco Regis. The caſe was, that a Leet was held die Jovis poſt feſtum Sancti Mich. Arch. 17 H. 8. of the Prior of the houſe of St. John de Bethlehem de Sheine, of his Manor of Leviſham in the County of Surrey, before John Beare the Steward there, a grand Jury was charged to inquire for the King of all offences inquirable within the ſaid Leet, where one Philip Aldwin, who was a Reſident within the ſaid Leet, appeared at the ſaid Leet, Idemque Philippus ſciens quandam Margaretam, uxorem Johannis Aldwin apud Eaſt Greenwich, infra juriſdictionem Letæ prædictæ, pluries perantea corpus ſuum

ſuum in adulterio vicioſe exercuiſſe, ac volens ipſam Margaretam pro republica in exemplum taliter offendere volentium legitime punire, ad dictam magnam juratam ſe perſonaliter exhibuit & eiſdem ſic juratis de dicta mala & vicioſa vita præfatæ Margaretæ inſtructionem & informationem veraciter dedit. Upon which the ſaid Margaret did draw the ſaid Philip into the Court of the Arch-biſhop of Canterbury, and there did Libel againſt him for Defamation of Adultery; And that the ſaid Philip ſaid in hiſce Anglicanis verbis; Margaret Allen is a Whore and a Bawd, and it is not yet three weeks agon ſince a man might take a Prieſt betwixt her legs; which Engliſh words were parcel of the words by which he informed the grand Inqueſt at the ſaid Leet: And upon this he had by award of the Court a Prohibition, by which Writ it appears, Quod per leges hujus Regni Angliæ omnes & ſinguli quicunque Domini Regis ſubditi coram quibuſcunque ipſius Domini Regis Juſticiariis ſeu quocunq; alio viro judiciali officio ſeculari fungente, in aliquam juratam patriæ jurati vel ad aliquas inſtructiones ſeu informationis alicui hujuſmodi jurat, in evidentias dandas comparentes & evidentias dantes, ab omni impetitione & calumnia in aliqua Curia Chriſtianitatis propterea fienda, quieti & liberi eſſe debent & in perpetuum penitus irreprehen. And by this Record it appears, and by the Stat. of 10 Ed. 3. c. 11. by which it is provided, that Indictors of Lay-people or Clerks in Turneys, and after delivering them before Juſtices ſhall not be ſued for defamation in Court Chriſtian, but that the Plaintiff who finds himſelf grieved ſhall have a Prohibition formed in the Chancery upon his caſe, which was but an affirmance of the Common Law, for the Statute provides only for indictors in the Turney only: And yet as well all indictors in other Courts, and all witneſſes, and all others who have affairs in the Temporal Courts, ſhall not be ſued or moleſted in Court Chriſtian, vide Paſch. 6 Eliz. in the Reports of the Lord Dyer (which caſe is not printed) John Halles in the caſe of marriage, betwæn the Earl of Hereford, and the Lady Katherine Gray, declared his opinion againſt the ſentence given by Commiſſioners Delegates of the Quæn, in a cauſe Eccleſiaſtical, under the Great Seal: And that the ſaid Sentence in diſ-affirmance of the ſaid marriage was unjuſt, wicked, and void, and that he thought that the ſaid Judges Delegates had done againſt their conſcience, and could not render any reaſon for the ſaid ſentence; And what Offence this was, was referred to divers Judges to conſider, by whom upon great deliberation it was reſolved, that this offence was a contempt as well againſt the Quæn, as to the Judges; and every of them were puniſhable by the common Law, by fine and impriſonment: And that the Queen may upon that ſue for it in what Court ſhe ſhall pleaſe: for the ſlander of a Judge in point of his Judgment, be it true or falſe, is not juſtifiable, &c. And all this appears by the report of the Lord Dyer, ſo that in the ſaid conſultation it was well provided, that the high Commiſſioners ſhould not intermeddle with any ſcandal by the common Law.

5. It was reſolved, that when any Libel in Eccleſiaſtical Court contains many Articles, if any of them do not belong to the cognizance of Court Chriſtian, a Prohibition may be generally granted; and upon motion made, conſultation may be made as to things which do belong to the Spiritual Juriſdiction: for the Writ of conſultation with a Quoad, is frequent and uſual, but a Prohibition with a Quoad, is Rara avis in terris nigroque ſimillima Cygno. And for theſe reaſons it was reſolved by all, that the Prohibition in the caſe at the Bar was well granted, which in truth was granted by Fenner and Crook Juſtices, in the time of the Vacation.

Note, theſe general Rules concerning Prohibition, quæ ſparſim inveniantur in libris noſtris.

Articuli Cleri c. 8. Non debet dici tendere in præjudicium Eccleſiaſticæ libertatis quod pro Rege & Repub. neceſſarium videtur.

Entries 444. 44. 7. Non eſt juri conſonum, quod quis ſuper iis quorum cognitio ad nos pertinet in Curia Chriſtianitatis trahatur in placitum.

Circumſpecte agatis, &c. Epiſcopus teneat placitum in Curia Chriſtianitatis de iis quæ mere ſunt ſpiritualia.

Weſt. 2. cap. 43. Prohibeatur de cætero Hoſpitalariis & Templariis ne de cætero trahant aliquem in placitum coram Conſervatoribus privilegiorum de aliqua re, cujus cognitio ad foram ſpectat Regium.

Ibidem. Non concedantur citationes priuſquam exprimatur ſuper qua re fieri debet citatio.

The knowledg of all caſes Teſtamentary, Matrimony, &c. by the goodneſs of the Princes, and by the Laws and Cuſtoms of the Realm appertain to ſpiritual Juriſdiction.

6. **It was reſolved, that this eſpecial conſultation, being only for Hereſie, Schiſm, and erroneous Opinions, &c. That if they convict** Fuller **of Hereſie, Schiſm, or erroneous Opinion, &c. that if he recant the ſaid Hereſie, Schiſm, or erroneous Opinion, that he ſhall never be puniſhed by Eccleſiaſtical Law: And after the ſaid conſultation granted, the ſaid Commiſſioners proceeded and convicted** Fuller **of Schiſm and erroneous Opinions, and impriſoned him and fined him two hundred pounds: And after in the ſame Term,** Fuller **by his Council moved the Court of Kings Bench to have a** Habeas Corpus, & ei conceditur, **upon which writ the Goaler did return the cauſe of his detention.**

Mich. 5. Jac. Regis.

First-fruits, Acts and Monuments, 351. & 352. NOte, Annates, Primitiæ, **and firſt Fruits, are all one; It was the value of every ſpiritual Living by the year, which the Pope, claiming the diſpoſition of all Eccleſiaſtical Livings within** Chriſtendom, **reſerved out of every Living; and thoſe, and Impropriations began about the time that** Polydore Virgil, lib. 8. cap. 2. **ſaith** Nullum inventum majores Romano Pontifici cumulavit opes quam id quod annuatam vocant, qui uſus omnino multo antiquior eſt quam recentiores ſcriptores ſuſpicantur, & annates more ſuo appellant primos fructus unius anni: vide Concilium Viennenſe quod Clemens Quintus indixit pro annatibus.

Theſe Firſt-fruits were given to the Crown by 26 H. 8. cap. 3.

Note, Hil. 34. Ed. 1. An. 1370. **At a Parliament held at** Carlile, **great complaint was made of intolerable oppreſſions of Churches and Monaſteries by** William Teſta (**called** Mala Teſta) **and the Legate of the Pope, and principally concerning Firſt-fruits, at which Parliament the King by the aſſent of his Barons denied the payment of Firſt-fruits of Spiritual Promotions within** England, **which were founded by his Progenitors and the Nobles, and others of the Realm, for the ſervice of God, Alms, and Hoſpitality; And to this effect he writ to the Pope, and thereupon the Pope relinquiſhed his demand of Firſt-fruits of Abbys, in which Parliament the Firſt-fruits for two years were granted to the King.**

Decimæ

Decimæ, id eſt, the Tenths of Spiritualties were perpetual, which in ancient times were paid to the Pope, until Pope Urbane gave them to R. 2. to aid him againſt Charles King of France, and others who ſupported Clement the ſeventh againſt him. Tenths perpetual.

And 5 H. 3. by the Bulls of the Pope, the Church of England began to pay the Tenths of all their Revenue, as well Spiritual as Temporal to H. 3. for years, Theſe were given to the King by the ſaid act of 26. H. 8. cap. 6. Acts and Monuments, 335. 336. an. Dom. 1266.

Vide Lambert de Priſt. Anglorum, &c. fol. 128. cap. 10. omnes qui habuerint 30. denar. vivæ pecuniæ in domo ſua, de ſuo proprio, Anglorum lege dabit denarium Sancto Petro, vide ib. inter leges Inæ. fol. 78. cap. 4. Peter-pence.

Lambert ib. expoſitione verbi, Monies and Peter-pence; Ina King of the Weſt Saxons granted it to the Pope when he was in pilgrimage at Rome, Cambd. Brit. pag. 306. ſaith, that it was Offa the Weſt Saxon King that did grant it: Quære.

Sir Anthony Ropers *Caſe.*

IN the caſe of Sir Anthony Roper, who was drawn before the high Commiſſioners at the Suit of one Bulbrook the Vicar of Bentley, for a Penſion out of a Rectory Impropriate, of which Sir Anthony was ſeiſed in fee: And the high Commiſſioners ſentenced the ſaid Sir Anthony to pay that, which he refuſed; and upon this they committed him to Priſon, who in this Term by Habeas Corpus appeared in Court, upon the return of which Writ the matter did appear: And it was well debated by the Juſtices, and was reſolved, that the ſaid Commiſſioners had not authority or commiſſion in the ſaid caſe, for when the acts of the 27 H. 8. & 31 H. 8. of Monaſteries had made Parſonages Impropriate, and other Religious Poſſeſſions Lay-fee, although that Penſions were ſaved, yet as it appears by the Preamble of the act of 34 H. 8. cap. 16. thoſe to whom the Penſions appertain, had not remedy for the ſaid Penſions, &c. And for this there it is provided, that if the Farmer or Occupier of ſuch Poſſeſſions ſhall wilfully deny the payment of any ſuch Penſions, Portions, Corrodies, Indemnities, Synod Priories, or any other Profits, whereof any Arch-biſhop, Biſhop, Arch-deacon, or any other Eccleſiaſtical perſon were in poſſeſſion at, or within ten years next before the time of ſuch diſſolution of any ſuch Monaſtery, &c. that then it ſhall be lawful for the ſaid Arch-biſhop, Biſhop, or other Eccleſiaſtical perſon aforeſaid, being ſo denied to be ſatisfied and paid thereof: And having right to the thing in demand, to have ſuch proceſs, as well againſt every ſuch perſon or perſons, as ſo ſhall deny payment, &c. as againſt the Church and Churches charged with the ſame, as heretofore they have lawfully done, and as by, and according to the Laws of this Realm they may now lawfully do, &c. And if the King hath covenanted to diſcharge the Patentee, &c. of Penſions, and then ſuit ſhall be made for the ſame in the Court of Augmentations, and not elſewhere; then if the high Commiſſioners will determine of Penſions, they ought to do it by the act 34 H. 8. and the ſaid act gives this expreſſly to Ordinaries, and their Officials, and the high Commiſſioners have their authority by the act 1 Eliz. made a long time after.

But it was objected, that the ſaid act 1 Eliz. gave to the Queen, her Heirs and Succeſſors, power to aſſign Commiſſioners to exerciſe and exe-

cute

execute all manner of Juriſdiction Spiritual, to viſit, reform, &c. all Schiſm and Hereſie, &c. and Enormities which by any manner of Spiritual Juriſdiction can, or lawfully may be reformed. And it was ſaid, that ſuch Spiritual Juriſdiction which the Biſhop ſhould have, is transferred to the high Commiſſioners.

But it was unanimouſly reſolved by Coke, Walmſley, Warberton, Daniel and Foſter, Juſtices, that the Act 1 Eliz. doth not extend to this caſe for divers cauſes, viz.

1. For that the ſaid clauſe of Reſignation is not more large then the clauſe of Reſtitution; and that the Act of 1 Eliz. doth not take away nor alter any Act of Parliament, unleſs thoſe only which are expreſſly named in the Act: And it was reſolved that the high Commiſſioners cannot hold plea for the double value of Tythes carried away before ſeverance, for two cauſes.

(1.) For this, that the Statute 2 Ed. 6. cap. 13. gave the Cognizance of it to Spiritual Judges, which is to be intended of ſuch Spiritual Judges who then were.

(2.) Subſtraction of Tithes is injury and no crime, but concerns intereſt and property: And for this the high Commiſſioners cannot meddle with it,

2. For that the words of the Act 1 Eliz. are (which by any manner of Spiritual Juriſdiction can or lawfully may be reformed) And it appears that theſe words extend to the crime only, and not to the caſes of Intereſt betwixt party and party; for the words are: All ſuch Errors, Hereſies, &c. which by any manner, &c. ſo that (ſuch) and (which) are Relatives.

3. This Juriſdiction was given to the Biſhops by Act of Parliament, viz. by 34 H. 8. which is more temporal than ſpiritual: And for this out of the precedent words 1 Eliz. viz. Spiritual or Eccleſiaſtical Juriſdiction, which is to be intended of Juriſdictions meerly or purely Spiritual, but Acts of Parliament are more temporal than ſpiritual.

4. It was not the intent of the Act 1 Eliz. which revived the Statute 23 H. 8. cap. 9. by which Act it is enacted, that none ſhall be ſued out of his Dioceſs, &c. that the high Commiſſioners for private cauſes ſhall ſend for Subjects out of any part of the Realm, and ſo in effect confound the Juriſdiction of the Ordinary who is an officer and Miniſter ſo neceſſary that in divers cauſes the Courts of the King cannot adminiſter to Subjects without him, &c.

5. If the Act of 1 Eliz. had extended to give to high Commiſſioners power to determine meum & tuum, as Penſions, Tithes, Legacies, Matrimonies, Divorces, Adminiſtrations, Probates of Teſtaments, &c. the Act would alſo give the party grieved benefit of appeal, and not give abſolute authority to the high Commiſſioners finally to determine Meum & tuum, and to baſtardile Iſſues, &c. without any controlement, for this ſhould be diſſolved in the Court of the Ordinary which is ſo antient and inevitably neceſſary in many caſes to the adminiſtration of Juſtice, in divers points of it, that without this, Juſtice cannot be executed.

6. The high Commiſſioners cannot extend themſelves but only to Crimes, for the clauſe which gives to them power to impriſon, &c. and to puniſh, &c. and impriſon ſuch Offender, &c. And (Offender) is only to be intended of him who commits any crime, and not of him who detains Penſion, Legacy, Tythes, &c.

Mich.

Mich. Jac. Rot. 2254.

PRæceptum fuit Guardiano priſonæ Domini Regis de Fleet. Quod haberet hic; viz. apud Weſtmonaſterium immediate poſt receptionem hujus brevis corpus Anthonii Roper militis in priſona prædicta ſub cuſtodia ſua detenti quocunque nomine cenſeretur, una cum die & cauſa captionis & detentionis ejuſdem Anthonii: Et iidem Juſticiarii hic, viſa cauſa illa, ulterius fieri fecerint quod de jure & ſecundum legem & conſuetudinem regni Domini Regis Angliæ fuerit faciendum: Et modo hic ad hunc diem, ſcilicet diem Sabbati proximum poſt octabis Sancti Mich. iſto eodem termino venit prædictus Anthonius in propria perſona ſua ſub Cuſtodia prædicti Guardiani ad barram, hic prædict. & idem Guardianus, tunc hic mand. Quod ante adventum brevis predicti, viz. nono die octabis ultimo præterito prædictus Anthonius Roper miles reducit ſe priſonæ prædictæ perantea commiſſus virtute cujuſdem warranti, dati 30. die Junii ultimo præterit, quod ſequitur in hæc verba, viz.

Hab. Corpus retorn. and diſcharge by judgment of the Court.

THeſe are in his Majeſties name to require and charge you, by vertue of his high Commiſſion for cauſes Eccleſiaſtical, under the great Seal of England, to us and others directed, that herewith you receive and take into your Cuſtody the body of Sir Anthony Roper, Knight, and him ſafely detain Priſoner at this our commandment, until we ſhall give order for his enlargement, ſignifying unto you, that the cauſe of his commitment is, for that there being a certain cauſe referred unto us by his Majeſties ſpecial direction, betwixt him the ſaid Sir Anthony Roper and John Bulbrook Vicar of Bentley, for that he detained wrongfully from him the ſaid Vicar, a certain yearly Penſion due unto him from the ſaid Sir Anthony; And being thereupon called before us, and after full hearing of the cauſe in the preſence of Sir Anthony and his Council at three or four ſeveral times,, and at the laſt adjudged by us to pay the ſaid Penſion, he having ſome time of deliberation given unto him by us to conſider thereof, hath notwithſtanding obſtinately diſobeyed the ſaid Order, and doth ſo ſtill perſiſt: And this ſhall be your Warrant in that behalf; Given at Lambeth this thirtieth of June, 1607. Et quod hæc fuit Cauſa Captionis & detentionis, predicti Anthonii in priſona prædicta, corpus tamen prædicti Anthonii modo hic paratus habet prout per breve prædictum ſibi præceptum fuit, &c. ſuper quo, viſis præmiſſis & per Juſticiarios hic plenius examinatis & intellectis, videtur iiſdem Juſtic. hic quòd prædicta Cauſa commiſſionis prædicti Anthonii priſonæ de Fleet prædict. in retorno prædict: ſuperius ſpecificata minus ſufficiens in lege exiſtit ad detinendum prædictum Anthonium in priſona prædict. Ideo prædictus Anthonius à priſona prædicta per Curiam hic demittitur, ac idem Guardianus de hujuſmodi Cuſtodia per eandem curiam hic plene exoneretur &c. And this was reſolved una voce by Coke chief Juſtice, Walmſly. Warberton, Daniel, and Foſter Juſtices, for the cauſes and reaſons afore expreſſed.

And in the very ſame Term in Lanes caſe, a Parſon in Norfolk who ſued one of his Pariſhoners before the high Commiſſioners, for ſcandaling of him, ſaying in the Church on the Sabbath before all his Pariſhoners, That he was a wicked man, and an arrant Knave: Prohibition lies, for this, that it was not ſo enormous as the Statute intended: Note, that by expreſs Proviſo, the high Commiſſioners cannot intermeddle with all Hereſies, but with exorbitant Hereſies, &c. and the other ſhall be determined before the Ordinary.

Hill.

Hill. 5: Jac.

Justice of *Wales* cannot be by Commission but by Patent.

NOte, it was moved to the Justices this very Term, upon consideration of the acts of 34 H.8. cap. 28. and the 18 Eliz. If the Justices in Wales may be constituted by Commission; and upon conference it was conceived they could not, but that it ought to be by Patent, as it hath been used ever since the act 34 H.8. Then it was moved, if the King which now is, may by force of a clause of 34 H. 8. do it, which clause is, That the Kings most Royal Majesty shall and may at all times hereafter from time to time, change, add, order, alter, minish, and reform all manner of things before rehearsed, as to his most Excellent wisdom and discretion shall seem meet: And also to make Laws and Ordinances for the Common-wealth, and good quiet of his said Dominion of Wales, and his Subjects of the same, from time to time, at his Majesties pleasure. And it seemed to divers of the Justices, that this power given to the King determined by his death, for divers causes.

1. It wants these words, His Successors, and for this it ought to be drawn in succession by construction, and that should be against the intention of the makers of the act, for they gave this high power of alteration, &c. of the Laws to the Kings most excellent Majesty, as to his most excellent wisdom and discretion shall be thought most meet; which words want, His Successors: For as his wisdom and discretion, which they well knew, did not go in succession, so the power and great confidence which was annexed to them did not go in succession; and for this, that Eorum progressus ostendunt multa quæ ab initio provideri non possunt: And what enlues upon this Act of the 34 H.8. concerning this uniting of Wales and England, and the subjection of them to the Laws of England, none could divine: For this cause it was thought reasonable that King H.8. during his time, might alter them; that he seing the obedience of those of Wales, and the good fruit which proceeded out of the said Act, never altered any part of it: But it was never the intention of the said Act to give power to the King and his Successors for ever, to alter, &c. the Laws, so that none of that Country could be certain of his Life. Lands, Goods or liberty, or any thing which he hath, and that would be of great servitude, Misera servitus est, ubi jus est vagum: Also the words are for the Common-wealth, &c. if his Majesties Subjects of Wales, at his Majesties pleasure, &c. by which it appears that the intention of the makers of the Act, was to give this power to King H.8. for his pleasure, did determine by his death.

2. Power of alteration of Laws, &c. is a point of high confidence concerning the administration of Justice, which the act by omitting [of his Successors] intended to unite this confidence to the person of H. 8. and not to extend it without limitation of time to his Successors: And this stands with the construction of Law in other cases, for all Commissions concerning the administration of Justice, determine by the death of the King, yea he constitutes them Justiciarios suos, which authority being in case of Administration of Justice determines by the death of the King, or resignation, 1 Ed.5.1. 1 H.7.1. 14 Ed.4.44. yet if the King make a Lease Durante bene placito, or present one to a Church, these are not void by his death, until, they are controlled or revoked by his Successor: But the Office of a Sherif which is granted, Durante bene placito, determines by the death of the King, for this concerns the administration of Justice: And upon certificate of the opinion of the Justices, that the Justices of Wales cannot be constituted by commission to the Lord Chancellor, Baron Snigg had a Patent for the circuit of Wales, as others had before.

Trin.

Trin. 6. Jac.

THis Term it was resolved Per totam Curiam in Communi banco, viz. Coke chief Justice, Walmsley, Warberton, Daniel, and Foster, in the case of Allan Ball, that the high commissioners cannot by force of the Act, 1 Eliz. cap. 1. send a Pursivant to arrest any person subject to their Jurisdiction, to answer to any matter before them: But they ought to proceed according to Ecclesiastical Law, by citation: For the Statute 1 Eliz. did not give them any such Authority to arrest the body of any Subject upon surmise: And although that it be comprised within their Commission, that they may send for any by Pursivant, &c. yet inasmuch as this hath no foundation upon the act of 1 Eliz. the King by his commission cannot alter the Ecclesiastical Law, nor the proceedings of it, for the Act says, that the Commissioners shall exercise, use, and execute all the Premisses (according to the priviledg of the Act) according to the said Letters Patents, id est, the Letters Patents which are mentioned and authority before, for this is imployed within this word (said) and for this without Question, the Commission only without the Act cannot alter the proceedings of the Ecclesiastical Law: And in the Circuit of Northampton, when the Lord Anderson and Glanvil were Justices of Assise, a Pursivant was sent by the Commissioners to arrest the body of a man to appear before them, and in resistance of the arrest, and striving amongst them, the Pursivant was killed: And if this was Murther or not, was doubted, and this depended upon the validity of power and authority of the Pursivant, for if this Authority was lawful, then in killing of an Officer of Justice in execution of his Office, is murther; And advisement was taken till the next Assises: and upon conference at the next Assise it was resolved, that the arrest was Tortius, and by consequence that this was not murther: But they may send Citation by a Pursivant, and proceed, if the party made default, to excommunication, and then to have a Capias excommunicatum, and to imprison him by the Writ of the King, which Writ De excommunicato capiendo, is preserved and retornable by the Statute of 5 Eliz. which shall be in vain, if they may arrest him by a Pursivant before any answer or default made: And this will be against the Statute of Magna charta, and all the ancient Statutes, which see Restal, Title Accusation: If a free-man shall be arrested upon a bare surmise or accusation: which Statutes if good and profitable for the Weal-publike, never were intended to be repealed by the said Statute of 1 Eliz.

High Commission. Pursivant.

Simpsons Case. before the Judges of Assise in *Northamptonshire*. 42. *Elizabeth.*

Note, that neither the Star-Chamber nor Chancery awards any Messenger to arrest the Body until a contempt made, but first a Subpœna, &c.

Marmaduke Langdale's *Case*, *vi.* 58.

IN the case of Marmaduke Langdale of Leaventhorpe in the County of York, by Joane his Wife, being sued for maintenance before the Bishop of Canterbury, and other high commissioners: it was resolved Per totam Curiam, præter Walmsley who doubted of it, that a Prohibition, which before was granted

High Commission.

granted, was well maintainable, for this, that it was not any enemity, nor any Offence within the Statute but a neglect of his duty, and a breach of his vow of maintenance; also the party shall be defeated of his appeal: And for that reason it belongs to the Court of the Ordinary: And the Rule of the Court was, that the Plaintiff shall count against the high Commissioners (for against his Wife being one person in Law with him, he could not count) and upon demurrer joyned, the case to be argued and adjudged, upon which the party grieved may have a Writ of Error, Si sibi viderit expedire, &c. See more, fol. 58.

On Sunday last, my Lord chief Justice and my self, at Serjeants Inn in the after-noon, received by the hands of the Kings Attorney by commandment, as he signified to us by your Lordships, the said complaints, exhibited to his Majesty by the Lord President of Wales, and the Lord President of York, against the Judges of the Realm, with a signification of your Lordships pleasure, that we two should impart the same to the rest of our Brethren, which we did on Munday in the after-noon, the fore-noon being spent in the publick service of the Realm, at Westminster: And upon consideration had of parts of the complaint, we have, as this short time will give us leave, being daily imployed, as well in the Courts at Westminster, as some of us for tryalls of Writs of Nisi prius, resolved upon these answers, which we knowing to be Warranted by the Laws of this Realm, doubt not but will be allowed by your Lordships; And do hope that where the Judges of this Realm have been more often called before your Lordships, then in former times they have been, which is much observed, and gives much emboldning to the Vulgar, that after this day we shall not be so often (upon such complaints, your Lordships being truly informed of our proceedings) hereafter called before you.

And seeing that my Lord President of York hath now Ore tenus, first opened the cause of his grief more amply, and in some cases more particularly, I will begin to those objections that have been made on the behalf of that Council, wherein for method, and for avoiding of confusion, I will first speak to the true cause of the Institution of that Court.

2. That our proceedings in granting of Prohibitions, is for the matter justifiable by Law.

3. That the manner of our proceedings was respectful and comly towards the Lord President of Yurk, and the Council there.

4. Answers to all objections both particular and general.

5. Remedies for the time past, if there be just cause.

6. And lastly, remedies for the future, to take away all the causes of opposition between the Judges and both the said Councils: viz.

After the suppression of all Religious houses, to the value of two hundred pound, or under, An. 27. H. 8. in the begining of October, An. 28 H. 8. there was a great insurrection of the Lord Hussey, and twenty thousand persons in Lincolnshire, about the cause of Religion, against whom Charles Brandon Duke of Suffolk went and appeased them.

As soon as they were appeased, a great Commotion began of 40000 men of that County, Sir Robert Ask being Chief, against whom the Duke of Norfolk went and dispersed them. Soon after in Lancashire began a great Rebellion of men of that County, and of Cumberland, Westmerland, and Northumberland, against whom the Earl of Derby was imployed, and quieted them: After that, Musgrave Tilby, and others, began to raise a great number, and assaulted Carlile Castle, whom the Duke of Norfolk overthrew.

Presently after Sir Francis Bigot with a multitude of people, made an Insurrection

Inſurrection at Setrington, Leigh, Pickering, and Scarbrough in Yorkſhire, whom the Duke of Norfolk pacified: And ſoon after the Lord Darcy, Ask, Conſtable, Bulmer, &c. began a new Commotion about Hull in Yorkſhire, whom the Duke of Norfolk appeaſed. And all theſe Rebellions were betwæn the beginnings of 28, and 30. of H 8. within which time many of the Rebels were executed in Furore belli, and in Flagranti crimine, by Marſhall Law, and ſome attainted by the Common-Law. The King intending the ſuppreſſion of the greater houſes of Religion, which An. 31 H. 8. he effected, he eſtabliſhed a Council there for the quiet of the Countries of Yorkſhire, Northumberland, Weſtmerland, Cumberland, Dureſme, the Counties of the City of York, Kingſton upon Hull, and Newcaſtle upon Tine, for preventions of Riots, Tumults, and Inſurrections in thoſe Counties and places: In this time of neceſſity and danger, the King did arme the Preſident and Council with two authorities in one Commiſſion: the one a Commiſſion of Oyer and Terminer; de quibuſcunque congregationibus & conventiculis illicitis coadunationibus, conferationibus Lolardiis, impriſionibus falſis, allegatis, trangreſſionibus, Riotis, Routis, retentionibus, contemptibus, falſitatibus, mainutenentiis, oppreſſionibus, violentiis, extortionibus & aliis malefactis, offencis, & in juriis quibuſcunque, per que pax & tranquilitas ſubditorum noſtrorum Comitatibus, Civitatibus, & villis prædictis gravat, &c. Secundum legem & conſuetudinem regni noſtri Angliæ vel aliter ſecundum ſanas diſcretiones veſtras audiendum & terminandum.

The other authority was, Nec non quaſcunque actiones reales ſeu de libero tenemento, & perſonales, cauſaſque debitorum & demandorum quorumcunq; in Com. &c. prædictis, quando ambæ partes vel altera pars ſic gravata paupertate gravata fuerit quod commode Jus ſuum ſecundum legem Regni noſtri aliter proſequi non poſſit, ſimiliter ſecundum leges & conſuetudines regni noſtri Angliæ vel aliter ſecundum ſanas diſcretiones veſtras. And this is all the authority that the Preſident and Council had firſt expreſſed in their Patents, without any private Inſtructions: and this appears by the Commiſſion under the great Seal, 31 H. 8. 6 Pars. Roberto Landavenſi Epiſcopo Præſidenti Concilii, & aliis; out of which Charter theſe things were obſerved, Viz.

1. That the final intention of the Commiſſion was, Quod pax & tranquillitas ſubditorum præſerventur.

2. That they hear and determine Riots, Routs, &c. according to Law, or their diſcretions, which authority by diſcretion was added, Ad faciendum populum: For it was reſolved without Queſtion, that in ſuch caſes they had not power but to proceed according to Law, for that is Summa diſcretio, and not according to their private conceits and affections, quia talis diſcretio diſcretionem confundit, ſo the other clauſe concerning real and perſonal Actions in all the Counties of York, Northumberland, Cumberland, Weſtmerland, Dureſme, and the Towns aforeſaid, was only Ad faciendum populum, for this was utterly void in Law. For,

1. No ſuch general authority granted, may be made by the Commiſſion of the King, to hear and determine all real actions within ſuch a County according to Law, as he may by Charter within a certain County or particular place, for the King by Commiſſion may give power to determine criminal cauſes between the King and the party, Secundum legem & conſuetudinem Angliæ, but he cannot give power by Commiſſion to determine cauſes between party and party: As it was reſolved in Scrogg's caſe, An. 2 Eliz. fol. 175. in Dyer. vide Dyer. 236. But the King by his Letters Patents may grant to ſuch a corporation in ſuch a Town, Tenere placita realia, perſonalia, & mixta; And none by this can have any prejudice, for the proceeding ought to be according to Law; and if they erre, the party grived may have his Writ of Error: but the Court cannot grant to them a Court

of Equity for the cauſe aforeſaid; And for this Cauſe, that ſuch a Judge ſhould be without controlement: And it was ſaid, that if ſuch Commiſſioners cannot determine Felonies, or other criminal cauſes by Writ, but by Commiſſion, ſo cannot any determine private cauſes betwixt party and party by Commiſſion but by Writ, by the Statute of Magna Charta, cap. 12, and Weſt. 2. cap. 30. Recognitiones de nova diſſeiſina, &c. non capiantur niſi in propriis Comitatibus: Which act gives authority to Juſtices of Aſſiſe in their proper Counties, by which it appears, that without an Act of Parliament, the King by his Letters Patents cannot put and authoriſe Juſtices De Aſſiſas Capiendas, to take them within another County: And for this the ancient Preſidents and proceedings of Law ought not to be altered. As a Juſtice of one Bench, or of the other, ought to be made by Commiſſion, and not by Writ, and yet he may be diſcharged by Writ 5 Ed. 4. 32. But Juſtices in Eyre are by Writ, as it appears by Bracton, lib. 3. cap. 11. and Britton fol. 1. Alſo by the Statute of Weſt 2. cap. 30. and of York cap. 4. Juſtices of Niſi prius, give judgment in Aſſiſes of Darrein preſentment, and Quare impedit in ſuch a County, which cannot be done without Parliament, Et ſic de cæteris.

Alſo it was obſerved, that at the firſt the ſaid Commiſſion concerning actions between party and party, extended only when both the parties, or one of them were ſo poor, as they were not able to proſecute at Law: Alſo by the firſt Inſtitution they had no power to grant Injunctions. And laſtly, their Commiſſion was Patent under the great Seal, and inrolled in Chancery: And thus much was ſaid for the Firſt, concerning the true cauſe of the Inſtitution of the Court, Viz. For preventing of Tumults and Rebellions, and when it began.

2. As to the ſecond point, the granting of Writs of Habeas Corpus, and Prohibitions, is juſtifiable by Law; for whereas at the firſt their authority was Patent, it is now private; for the Letters Patents do refer unto certain Inſtructions which are no where of Record, but kept in private, and it was feared, for private reſpects, Et de non apparentibus & non exiſtentibus eadem eſt ratio: beſides, the danger to the Subject is great, for if they loſe their Inſtructions (as it hath hapned heretofore) all is Coram non judice: And this firſt reaſon is drawn from the Inſtructions themſelves: The ſecond reaſon is drawn from the contumacy of the party that ſuppoſeth himſelf to be grieved by the Prohibition, and againſt whom it is granted; if the authority of the Council be never ſo good, yet being late and particular Juriſdiction, the party muſt of neceſſity plead it, ſo as it may appear unto us judicially; for as we are Judges of Record, ſo muſt we be informed of Record, and never yet hath any party prohibited moved in Court to have a conſultation, by which might be ſet forth the Juriſdiction of that Court and Council, ſo as the granting of Prohibitions hath been juſt; and the fault (if any be) in the parties themſelves, that never hitherto made their cauſe known, as it ought to be by Law, to the Court.

The third reaſon is drawn from the great injury offered to the defendants, for it is a true Rule, Miſera ſervitus ubi jus eſt vagum aut incertum: The Defendants by Law, may in all Courts plead to the Juriſdiction of the Court; but how can they do ſo, when no man can poſſibly know what Juriſdiction they have: concerning matters of State, which are Arcana imperii, it is meet they ſhould be kept ſub ſigillo conſilii, and in ſecret: but for Juriſdiction between party and party, for deciding of Meum & tuum, God forbid they ſhould not be known to them who are to be judged by them; but the keeping of them in ſuch ſecrecy bewraieth that the Council are afraid that they would not be juſtified if they were known: And it was

con-

concluded again, Misera servitus ubi jus aut vagum aut incertum.

3. But proceedings herein have been respectful: for a Jury of Officers and Attorneys of our Court, being according to an ancient custom, time out of mind of man used, sworn to present amongst other things and Articles, all defaults of Officers and Ministers in not executing the Writs and Process out of this Court, and all impediments and hindrances whatsoever of the due proceedings of this Court, whereby Justice cannot be administred: And finding upon their Oaths divers unjust and undue impediments of the proceedings of this Court, by the said Council in particular: And thereupon a motion being made in open Court in Michaelmas Term last, by the Kings Serjeant Philipps, of many intolerable grievances of the Subject, offered by the said Council, to many of his Majesties Subjects in derogation of the Kings Laws, in prejudice of the Kings rights, and in hindrance of the due proceedings of this Court, prayed the Court according to Law and Justice, to grant several Prohibitions in all those several causes, which we could not deny; but yet thought fit before we granted the same, that there might be a good correspondence betwen both Courts: we should first confer with Sir Cuthbert Pepper, Attorney of the Wards and one of that Council, to let him understand the particular grievances and oppressions, and to hear what he could say in the justification thereof, who accordingly upon motion came to us to Serjants-Inn, with whom we conferred, and signified to him the particulars of the said grievances, who would not take upon him to justifie the same in no sort, but said, he would acquaint the President and Council therewith, and return their answer, which for that it was neglected, we upon further motion in Court granted Prohibitions, as in Justice we ought, which course and order of proceedings we hold to be respectful and comly toward the Lord President and Council.

4. It was objected, that more Prohibitions had been granted of late, than in many years before, whereunto a sixfold answer was made.

1. That they had exceedingly multiplied the number of causes, so as they have above two thousand depending at one time, and having but five Counties and three Towns, at one sitting there were about 450 causes at hearing, whereas the Chancery that extends into 41 Counties English, and 12 in Wales, in all 53, had in Easter Term, but 95 to be heard, and in Trin. Term, but 72; so as if they multiply their causes so infinitely above what were at the first, it is no wonder if the number of Prohibitions be increased.

2. Besides the multiplication they have innovated and taken upon them to deal in causes which we know never any President could, and we think never any President and Council did usurp: As first, Suits upon penal Laws, and many of them limited to the Courts at Westminster. but all of them without question out of their Jurisdiction: As for example, betwen Harrison and Thurstone in English Bill, upon the Statute 39 Eliz. of Tillage, whereas the very Statute giveth Jurisdiction to certain special Courts: The Defendants pleaded to the Jurisdiction, whereupon an Attachment was awarded against him, and fined.

3. In the case of Hartley after Indictment of forcible entry and restitution, according to the Statute upon an English Bill dispossessed by the President.

4. And after a recovery in an Ejectione firmæ, and execution by Habere facias possessionem out of our Court, they upon an English Bill, dispossess'd the Plaintiff, and this was Harts case. Between Jackson and Philipps, after Judgment in our Court, suit there by English Bill. Between Stanton and Child, after execution in debt by process out of our Court they commit the Plaintiff

Plaintiff, an old man and lame. Betwæn Binns and Collet, after the Defendant was outlawed in an action of Battery.

5. They admitt Engliſh Bills in the nature of Wꝛits of Erroꝛ, and of Formedons and other real actions.

6. They will admit no plea of Out-lawry in diſability of the Plaintiff.

7. They uſually gꝛanted Injunctions to ſtay the common Law, which is utterly againſt Law, and ſometimes to ſtay ſuits in Chancery, and in the Exchequer Chamber, and many other pꝛocædings which are againſt Law and reaſon, to the gꝛeat oppꝛeſſion and gꝛievance of the Subject, ſo in reſpect as well of the multiplication of Suits as Innovations of others. It may very well be that moꝛe Pꝛohibitions and Habeas Corpus have bæn gꝛanted of late then were in times paſt; And yet there hath bæn moꝛe gꝛanted, and moꝛe ancient then is ſuppoſed: Foꝛ Mich. 7. Eliz. Rot. 31. upon a motion made by Carus, the Kings Serjeant, Habeas Corpus was gꝛanted out of the Kings Bench, foꝛ the body of John Lamburn, alias Lambert, which Wꝛit being returned, that he went to the Caſtle of York where John Lambert was a Pꝛiſoner, and that one Oſwald Wilkinſon, the Goaler refuſed to deliver him, without the leave of the Arch-biſhop of York: Pꝛeſident of the Council there, whereupon he went to the Arch-biſhop, and ſhewed unto him the Quæns Wꝛit of Habeas Corpus; whereunto the Arch-biſhop anſwered, that John Lambert was not the Sheriffs Pꝛiſoner, but was committed by him and the Council to the Goalers cuſtody, and thereforꝛe he ſhould not be delivered, and thereforꝛe he ſent one Morgan his Secretary to the Goaler, that he ſhould not be delivered; And thereupon as well foꝛ the contempt in the Arch-biſhop, and the Goaler, as foꝛ the inſufficient return in not having the body, Carus the Kings Serjeant moved foꝛ an Attachment againſt the Arch-biſhop of York, and Wilkinſon the Goaler, foꝛ the contempt returned by the Sheriff, and it was gꝛanted, and the Sheriff was amerced, foꝛ that he ſhewed no lawful cauſe, Mich. 7. & 8. Eliz. in libro de Habeas Corpus. John Dawſon in Pꝛiſon foꝛ a Riot, by Engliſh Bill, beforꝛe the Pꝛeſident and Council of York, removed by Habeas Corpus and delivered: foꝛ no man ought to be convicted foꝛ a Riot, but by Indictment, tꝛyal, oꝛ other due pꝛoceſs at Law: and there are many other like Wꝛits of latter time, Paſch. 12. Eliz. in libro de Habeas Corpus, Thomas ap Morgan, committed by the Council and Pꝛeſident of Wales &c. and finding the cauſe unjuſt, bailed him, &c. And in Trin. 20. Eliz. ib. the like Wꝛit foꝛ the body of John Rowland, committed by the Pꝛeſident and Council of Wales, and finding by the return that the commitment of him was againſt Law, he was diſcharged by the Court, and many moꝛe of that nature.

na pꝛs hꝰ fees belong not to yᵗ sheriff sic pty pꝛiſonꝛ dꝛ Gaoler or keepꝛ dꝛ caſtle, uncꝛicam

8. The Judges never gꝛant either Pꝛohibitions oꝛ Habeas Corpus, but upon motion oꝛ complaint by the party gꝛieved, ſo as if the parties have gꝛeater cauſe of complaint then they had in times paſt, there muſt of neceſſity be moꝛe Wꝛits of Pꝛohibition and Habeas Corpus gꝛanted then was heretofoꝛe.

9. The Pꝛocædings beforꝛe the Pꝛeſident and Council, are by abſolute power, their decrees uncontrollable and final, and moꝛe final then a Judgmen in a Wꝛit of Right, foꝛ thereupon a Wꝛit of Erroꝛ lyeth, but theſe ſentences are unreverſible, which makes them adventure, and pꝛeſume too much upon their authoꝛity, and tends to the gꝛeat oppꝛeſſion and gꝛievance of the Subject.

10. Theſe Suits there gꝛow to be moꝛe pꝛejudicial to the King than ever they have been, foꝛ by the multiplication and innovation of Suits, as well real as perſonal, the King loſeth his Fines, &c.

11. Remedy

11. Remedy for the time paſt, if we have erred in Judgment, a Writ of Error lieth in the Kings Bench; if the Kings Bench doth erre, a Writ of Error lieth in the Upper houſe of Parliament, where the King and the Lords be only Judges. Nota

12. For the time to come, firſt, that the Inſtructions be enrolled in the Chancery, whereunto the Subject may have acceſs, and know their Juriſdiction. 2. That the Preſidents and Councils have ſome Council learned in the Court, who may inform us judicially of their true Juriſdiction, and we will give a day to them before we grant any Writ, to ſhew cauſe to the contrary; ſo as Juſtice upon hearing of both ſides ſhall be done; and if we erre, the Law hath provided a remedy by a Writ of Error, and no other courſe can be taken: And we are ſworn both to maintain the Kings Prerogative and to do Juſtice to all men, according to the Laws and Cuſtoms of England: So as command my Lords, whatſoever it ſhall pleaſe you, that ſtands in our power, and which by our Oath we may perform, and we will moſt willingly obey it: And that which a great Divine ſaid to God Almighty, we ſay unto your Lordſhips who ſit in Gods Seat; Da Domine quod jubes, & jube quod vis, &c.

The particular caſes ſet down in the Petition are anſwered in the ſecond part of our proceedings juſtifiable untill they plead their Juriſdiction, and make it appear to the Court to be lawful. Concerning the Jury of Attorneys, it hath been anſwered before: And for the motion to have a Rule ſet down, &c. It was moved by the Kings Serjeant, and we adviſed thereupon: when this had been thus delivered, by way of anſwer, Bacon the Kings Sollicitor offered to reply, but after the Judge had ſpoken in the name of all his Brethren, the Lords would not ſuffer him to ſpeak after the Judge; But all others being deſired to retire into the next Chamber, the Lords had long and prudent conference amongſt themſelves, and after we were called in again, and then the Earl of Salisbury, Lord Treaſurer, by the conſent of that Honourable Table, gave this Reſolution;

1. That the Inſtructions ſhould be recorded for ſo much as concern'd either criminal Cauſes, or Cauſes between party and party: As for matters of State, if any be, the ſame not to be publiſhed.

2. That it was neceſſary, that both Councils ſhould be within the Survey of Weſtminſter Hall. Viz. The Courts of Weſtminſter.

3. The motion was wel allowed, that the Preſidents and Councils ſhould have Council learned in every Court: And that upon motion made in open Court, upon any Prohibition, to either of them, day ſhould be given to ſhew cauſe, &c.

4. The Lord Treaſurer repeated the ſentence, and ſaid, that true it is, *Ubi Lex aut vaga aut incerta, miſerrima eſt ſervitus*, where mens Eſtates and fortunes ſhall be decided by diſcretion.

And concerning the remoteneſs of the place, what reaſon ſhould there be at this time more for thoſe parts, then for the Counties of Cornwal and Devon, which are more remote than York; And this was an end of this daies work.

The

Heresie, Upon conference with Sir *John Popham* and others, An. 43. Eliz.

THe Arch-bishop and other Bishops and other the clergy at a general Synod or Convocation might convict an Heretick by the common Law. But for this, that it was troublesome to call a convocation of the whole Province, it was ordained by the Statute of 2 H. 4. cap. 15. That every Bishop in his Dioces might convict Hereticks; And Note, 2. Mary Brook, title Heresy, per omnes Justic. & Baker Chancellor of the Exchequer, and Hare Master of the rolls by that Statute. And if the Sheriff was present, he might deliver the party convict to be burnt, without any Writ De hæretico comburendo: But if the Sheriff be absent, or if he be to be burnt in another County, then there ought to be a Writ De hæretico comburendo; And that the common Law was such, vide. lib. intra. title Indictment, p. 11. who there are taken for Hereticks, some of them are consonant to true Religion, vide 11 H. 7. Book of Entries fol. 3. 19. see Dr. & St. lib. 2. cap. 29. Cosin. 48. 2. se the Statute of 1 & 2. P. M. cap. 6. That Ordinaries wanting authority to proceed against Hereticks, 3. F. N. B. fol. 269. And the Writ in the Register, which in the new Writ is omitted proves this directly, 4. Bracton lib. 3. cap. 9. fol. 123, 124. Concilio Oxoniensi quidam Diaconus convictus fuit de Apostasia, sed primo degradatus fuit per Ordinarium: And true it is, that every Ordinary may convent any Heretick or Schismatick before him Pro salute animæ, and may degrade him, as Bracton saith, and may injoyn him penance according to the censure of Ecclesiastical Law: But upon such conviction at Common-Law, the party convict shall not be burnt, nor any Writ De hæretico comburendo lyeth upon it: for the common Law will not commit the Decision of a Heresie, for the life of a Christian man, to any sole Judge.

The makers of the Act of 1 Eliz. were in doubt what shall be adjudged Heresie, and therefore if any person be charged with Heresie before the high Commissioners they have no authority to judge any matter or cause to be Heresie, but only such as hath been so adjudged by the authority of canonical Scriptures, as by the four first general Councils, or by any other general Council wherein the same was declared Heresie by the express and plain words of canonical Scripture, or such as shall hereafter be determined to the Heresie by Parliament with the assent of the Convocation, for so it is expressly provided by the said act, of 1 Eliz. And although this proviso extends only to the high Commissioners, yet seing in the high Commission there be so many Bishops and other Divines and learned men, it may serve for a good direction to others, especially to the Diocesan being a sole Judge in so weighty a cause.

At this day the Diocesan hath jurisdiction of Heresie, and so it hath been put in ure in all Queen Elizabeths Reign, but without the aid of the Act of 2 H. 4. cap. 15. the Diocesan could imprison no person accused of Heresie but was to proceed against him by the censures of the Church: for the Bishop of every diocese might convict any for Heresie before the Statute 2 H. 4. as appears by the preamble of it. But could not imprison, &c. and now seing that not only the said Act of 2 H. 4. but 25 H. 8. cap. 14. are repealed, the Diocesan cannot imprison any man accused of Heresie, but must proceed against them as he might have done before those Statutes by the censures of the Church; as it appears by the said act of 2 H. 4. cap. 15. Likewise the supposed Statute of 5 Rich. 2. cap. 5. and the Statutes of 2 H. cap. 7. 25 H. 8. cap. 14. 1, and 2. P. and M. cap. 6. are all repealed, so as no Statute made against Hereticks stands now in force, and at this day no person can be indicted or impeached for Heresie before any temporal Judge or other that hath temporal jurisdiction, as upon perusal of the said Statute appeareth.

There was a Statute supposed to be made in 5 R. 2. that Commissions should

ſhould be by the Lord Chancellor made, and directed to Sheriffs, and others to arreſt ſuch as ſhould be certified into the Chancery by the Biſhops and Prelates, Maſters of Divinity, to be preachers of Hereſies, and notorious errors, their Fautors, Maintainers, and Abetters, and to hold them in ſtrong priſon, until they will juſtifie themſelves to the Law of the Holy Church. By colour of this ſuppoſed Act, certain perſons that held, that Images were not to be worſhipped, &c. were holden in ſtrong priſon, until they (to redeem their vexation) miſerably yielded before theſe Maſters of Divinity to take an Oath, and did ſwear to worſhip Images, which was againſt the Moral and Eternal Law of Almighty God. We have ſaid by colour of the ſaid ſuppoſed Statute, &c. not only in reſpect of the ſaid Opinion, but in reſpect alſo, that the ſaid ſuppoſed Act, was in truth never any Act of Parliament, though it was entred in the Rolls of the Parliament, for that the Commons never gave their conſent thereunto. And therefore, in the next Parliament, though it was entred in the Rolls of the Parliament, for that the Commons never gave their conſent thereunto, therefore in the next Parliament, the Commons preferred a Bill reciting the ſaid ſuppoſed Act, and conſtantly affirmed, that they never aſſented thereunto, and therefore deſired that the ſaid ſuppoſed Statute might be anienied, and declared to be void: for they proteſted, that it was never their intent to be juſtified, and to bind themſelves and Succeſſors to the Prelates, more then their Anceſtors had done in times paſt, and hereunto the King gave Royal aſſent in theſe words, Leiſt an Roy. And mark well the manner of the penning of the Act, for ſeeing the Commons did not aſſent thereunto, the words of the Act be, It is Ordained and aſſented in this preſent Parliament, that, &c. And ſo it was, being but by the King and the Lords.

inf: 57 ſup: 56.

It is to be known, that of Ancient time, when any Acts of Parliament were made, to the end the ſame might be publiſhed, and underſtood, eſpecially before the uſe of Printing came into England, the Acts of Parliament were ingroſſed into Parchment and bundled up together with a Writ in the Kings name, under the great Seal to the Sheriff of every County, ſometime in Latin, and ſometime in French, to command the Sheriff to proclaim the ſaid Statutes within his Bayliwick, as well within Liberties as without. And this was the courſe of Parliamentary proceedings before Printing came in uſe in England, and yet continued after we had the Print, till the Reign of H.7.

Now at the Parliament holden in 5 R. 2. John Braibrooke, Biſhop of London being Lord Chancellor of England, cauſed the ſaid Ordinance of the King and Lords to be inſerted into the Parliamentary Writ of Proclamation to be proclaimed among the Acts of Parliament, which Writ I have ſeen, the purcloſe of which Writ, after the recital of the Acts directed to the Sheriff of N. is in theſe words: Nos volentes dictas Concordias, ſive Ordinationes in omnibus & ſingulis ſuis Articulis inviolabiliter obſervari, tibi præcipimus quod prædictas Concordias ſive Ordinationes in locis infra balivam tuam, ubi melius expedire volueris, tam infra Libertates, quam Extra, publice proclamari & teneri facias juxta formam prænotatam. Teſte Rege apud Weſtm. 26 Maii Anno Regni Regis, R. 2. 5.

But in the Parliamentary Proclamation of the Acts paſſed in Anno, 6 R. 2. the ſaid Act of 6 R. 2. whereby the ſaid ſuppoſed Act of 5 R. 2. was declared to be void, is omitted, and afterwards the ſaid ſuppoſed Act of 5 R. 2. was continually printed, and the ſaid Act of 6 R. 2. hath by the Prelates been even from time to time kept from the Print.

ſup: 57 5.6

Certain Men called Lollards were indicted for Hereſie upon the ſaid Statute of 2 H. 4. for theſe Opinions, viz. Quod non eſt Meritorium ad Sanctum Thomam, nec ad Sanctam Mariam de Walſingham peregrinari. 2. Nec Imagines Crucifixi & aliorum Sanctorum adorare. 3. Nulli Sacerdoti Confiteri niſi ſoli Deo, &c. Which Opinions were ſo far from Hereſie, as the makers of the Statute of 1 Eliz. had great cauſe to limit, what Hereſie was.

Mich. 6 Jac. Regis.

Prohibition.

IN the caſe of Langdale in this very Term, in a Prohibition to the high Commiſſioners, two points were moved; The one, if a Feme-covert may ſue for Alimony before the high Commiſſioners. The other, if the Court of the Common pleas may grant a Prohibition, when no plea is pendent in the Common pleas: As in this caſe no plea can there depend betwixt Husband and Wife. And forasmuch as this concerns the Jurisdiction of the Court, this was firſt of all debated, divers objections were made againſt it.

1. That this Court hath not Jurisdiction to hold plea without an Original, unleſs it be by priviledge of an Attorney, Officer, or Clerk of the Court, unleſs that it be in an eſpecial caſe, viz. when there is an Action there depending for the ſame cauſe; then it was agreed that a Prohibition ſhall be awarded out of the Common pleas, in reſpect that the Court hath an Action there depending for the ſame cauſe, and ſo being poſſeſſed of the cauſe, it gave the Court Juriſdiction to award Prohibition out of the ſame Court: And for that the Prohibition ought to recite, Quod cum tale placitum pendet, &c. and the Defendant Pendente placito prædicto, hath purſued in Court Chriſtian: And with this accords F.N.B. 43.g. where it is ſaid, that if a man be ſued in the Common pleas for a Treſpaſs, if the Plaintiff alſo ſue in Court Chriſtian for the ſame cauſe, the Defendant may ſhew this in the Common pleas, and ſhall have a Prohibition then directed to the Judges: And ſo always when the matter is pendent in the Common pleas, if ſuit be for the ſame cauſe in Court Chriſtian, he ſhall have a Prohibition: But a man ſhall have a Prohibition out of the Chancery, or Kings Bench upon his ſurmiſe, ſurmiſing that he is ſued in Court Chriſtian for a Temporal cauſe: And 2 Ed. 4. 11. 6. was cited, where it is held that Ne admittas, which is a Prohibition, doth not lie unleſs that the Quare impedit be pendent.

But it was anſwered and reſolved by Coke chief Juſtice, Warberton, Daniel, and Foſter, Juſtices, that the Common pleas may award a Prohibition, although that no ſuit be there pendent, for this, that the Common pleas is the principal Court of Common Law for Common pleas: For it belongs to the Juriſdiction of the Common pleas to determine all Common pleas.

Communia placita non ſequantur Curiam noſtram, as it is enacted by Magna Charta, which hath thirty two times been confirmed by other Acts of Parliament: Then if the Eccleſiaſtical Judges incroach upon the Juriſdiction of the Common pleas to hold plea of any thing againſt the Common Law of the Land, or of any thing triable by the Law, there the principal Court of Common Law ſhall grant a Prohibition, and that without Original Writ, for divers cauſes.

1. For

1, For that no Original Writ of Prohibition which iſſues out of the Chancery is returnable either in the Kings Bench or common Pleas, but is directed to Judge, or party, or both, and is not returnable at all: But it appears in the Regiſter, that if the Prohibition be contemned, then the Chancellor may award an Attachment to puniſh this contempt, returnable either in the Common pleas, or in the Kings Bench: But an Attachment in ſuch caſe is but as a Judicial Writ; And this appears by the Regiſter, fol. 33. And if the Attachment in ſuch caſe be returnable into the Common pleas, &c. the Plaintiff in the Declaration ſhall make mention of an Original Writ in the Chancery, and of the contempt, &c.

2. There was great reaſon that no Original Writ of Prohibition ſhall be returnable, for the common Law was a Prohibition in it ſelf, and he who did encroach upon the Juriſdiction of it incurred a contempt: And with this agrees our Books, as 9 H. 6. 56. in Attachment upon a Prohibition in the Common pleas, before William Babington then chief Juſtice of the Bench, concerning a Suit in Court Chriſtian of tythes of groſs Trees: And there Fulthorp the Serjeant took exception to the Count, for this, that the Plaintiff in his Count did not declare upon any Statute, nor that any Prohibition, ſcil. Original Writ, was directed unto him: And there it is held, that the Statute of 45 Edward 3. and the common Law alſo was a Prohibition in it ſelf: And thus the Rule of the Book, 19 H. 6. 54. Prohibition, for this, that one had ſued in a Court Baron againſt the common Law; And there Aſcue ſaid, the Statute is a Prohibition in it ſelf, ſo it is held in 8 R. 2. title Attachment ſur Prohibition, 15. Note, by Clopton in the Common pleas, who then was a Serjeant, that if a Plea be held in Court Chriſtian, which belongs to the Court of the King, without any Prohibition in facto, the Plaintiff ſhall have an Attachment upon a Prohibition, for this, that the Law is a Prohibition in it ſelf; for by the Law they ought to hold no plea, but that which doth belong to their Juriſdiction, quod fuit conceſſum, &c. Regiſter 77. Eſtrepment. Præcipimus quod inhibeas, &c. Fitz. N. B. 259. Regiſter 112. Superſedeas to a Court Baron, for holding Plea Vi & armis, for above forty ſhillings: And F. N. B. a Writ of Conſultation is as much an Original as a Prohibition; yet the Common pleas hath granted infinite Conſultations, ergo Prohibitions, Qui habet juriſdictionem abſolvendi, habet juriſdictionem ligandi: And one Writ is as Original as the other.

Note, there are ſeveral Writs of Expreſs Prohibitions, ſcil. Prohibitions with this word Prohibemus vobis, and Letters in the nature of Prohibitions, as Superſedeas, by which it is commanded, Quod ſuperſed. in placito prædicto. And Injunction is a Prohibition, alſo in its nature, for the words are an Injunction to the party, not to the Judge; and a Superſedeas is to an Officer or Judge, not to the party.

Expreſs Prohibitions are in two manners, the one founded upon a Suggeſtion, the other upon Record; upon Suggeſtion where no plea is pendent; but the Suggeſtion is the Foundation, for it is not ſo when a plea is pendent; upon record when the plea is pendent, Prohibitions founded upon Record as, Ne admittas, &c. ought to recite the plea pendent, for all thoſe which are founded upon Record ought to recite a plea pendent. So a Writ to the Biſhop to admit a Clerk, is a Judicial Latitat, as Dyer defends it: And as to the Book of 2 Edw. 4. it is well agreed, that this doth not lie in the Common pleas, unleſs a Quare impedit be depending, for this ought to recite a Writ to be depending; and it ſhould be againſt reaſon to reſtrain any to preſent, or to make Waſte by Eſtrepment, unleſs that a Writ be pendent;

And as to the Opinion of Fitzherbert, it was affirmed for good Law, for every one agrees it, that if a Plea be pendent in the Common Pleas, then a Prohibition there lies, and the pendency or not pendency of a Plea is not material for divers causes.

1. The pendency of a Plea may give a priviledge to the party, but no Jurisdiction to the Court in collateral Suit: And there is a diversity betwixt priviledge to the party, and Jurisdiction of Court, for a plea pendent may give Jurisdiction to the party, Eundo, redeundo & morando; but doth not give Jurisdiction to the Court to hold plea by Bill by collateral Suit against any other, as an Officer, Attorney or Clerk may.

2. The Prohibition in such case where Plea is pendent is no process Judicial upon the Record, for it is a collateral Suit.

3. If the common Pleas, which is the proper Court for common Pleas, cannot grant a Prohibition without a Plea pendent; certainly the Kings Bench, which holds plea of common Pleas, by secondary means, cannot do it: And so the Archbishop of Canterbury in his Articles concerning Prohibitions, holds, that neither the one Court nor the other may grant Prohibitions in such a case: But inasmuch as the common Law is instead of an Original, as hath been said, both Courts may grant it.

4. Infinite Presidents may be shewn of Prohibitions out of the common Pleas, without recital of any plea pendent, as is agreed on the other part: And true it is, that it ought not to be so, if the Court hath not Jurisdiction to grant any without plea pendent. Every petty Clerk of the Common Law shall have by his priviledge a prohibition without plea pendent: à fortiori, the Common Law it self may prohibit any one, who against the common Law shall incroach upon its Jurisdiction, and enquire of things done against the Jurisdiction of the Court. Plea pendent is cause of priviledge and not of Jurisdiction, 4 Ed.4.37. 37 H. 8.4. Action or information upon the Statute of 2 H.5.cap.5. is but an information to the Court of wrong done to the common Law, for this, that no Original Writ lies, as upon penal Law, upon Malum prohibitum, this is Malum in se, de quo Curia intelligi & informari voluit.

5. A President is in 22 Ed.4. where a Prohibition was granted out of the Common Pleas, for that the Plaintiff might have a Writ of false Judgment at the Common Law: The Record it self agrees with the Report.

6. Officers and Clerks, as well in the Common Pleas, as in the Exchequer, and Farmers of the King in the Exchequer, may have by priviledge of Court a Prohibition without Original: à fortiori, the Law it self shall have greater priviledge than an Officer or Clerk, and certainly to enforce the party to bring an action, will be a means to multiply Suits to no end, for the Law it self in 4 Ed.4. fol.37. if any man upon the Statute of 2 H.5. for not delivering of a libel, be brought into the Common Pleas: And if he cannot have a Prohibition without such Suit this shall be a cause, as hath been said, to multiply Suits, and is against the publick Weal: For he will bring his action upon the Statute before that he will be deprived of his Prohibition, and by that he gives himself cause of Prohibition; every Prohibition is as well at the Suit of the King as of the party, as is held in 28 Ed. 3. 97. false Latin shall not abate, nor Excommunication in the plaint is no plea: For this is the Suit of the King, as well for his Jurisdiction as for the party, who by Law may chuse his Court, 15 Ed. 3. title Corrody 4. The King may sue for this contempt where he pleaseth.

Note,

Note, that although the Original cauſe was in the Kings Bench for Corrody, Excommunication is no plea in diſability of the Plaintiff, becauſe it is the Suit of the King for contempt to his Law, vide 21 H.7.71. Kelway 6. in quare non admiſit. 4 Ed.4. 37. for not delivery of a Libel in the Common Pleas, and then he ſhall have a Prohibition by all the Juſtices: So upon the Statute of 2 Ed. 6.cap.13. for ſuing for Tithes where there is a preſcription, &c. And this ſhall be to introduce multiplication of Suits, when himſelf gives cauſe of Prohibition. 38 H.6. 14. 22 Ed. 4.20. 13 Ed. 3. title Prohibition 11. after a Judgment in the Common Pleas, after which the Patron ſues the Recoverer in Chancery, ſurmiſing equity, Attachment upon a Prohibition out of the Common Pleas, yet no plea pendent.

Note, the Reporter reporteth this Attachment to iſſue out of the common Pleas, for the Chancellor would not prohibit him.

32 H. 6.34. An Attorney in the Palace aſſaulted and menaced, the Court ſhall take a Bill and enquire of it, 4 Ed.4.36, 37. there a Prohibition without view of Libel, for this, that action was pendent, Statham Prohibition 3.

Prohibition ſuper Articulos, title Prohibition plea 5. gives a Prohibition before, ſcil. Coram Juſticiariis noſtris apud Weſt. vide F.N.B.fol.69.b. in a Writ of Pone, Regiſter indic. coram Juſticiariis noſtris apud Weſt. is the common Pleas. F. N. B. 64.d. 38 Ed. 3. 14. Statute 2 Ed. 6. cap. 13. ſuch Courts grant Prohibition who have uſed to grant them: Hales caſe in my Reports. Note, the reaſon that many Prohibitions were granted in the Kings Bench, for that no Writ of Error lies but in the plaint.

Mich. 6 Jac.

Mich.6. Jac.Rot.639.Robert Bancks Gent, brought an Action upon the Statute of Winton 13 Ed.1. againſt the Inhabitants of the hundred of Burnham, in the County of Bucks, and counted, that certain Wildoers to the Plaintiff unknown, at Hitcham in the County aforeſaid, which Town is in the Hundred of Burnham, the 22 Novemb. An. Regni Regis Jacobi 5. aſſaulted the Plaintiff, and robbed him of 25 l. 3 s. 2 d. ob. and that the Plaintiff immediately after the Robbery, ſcil. the 22 of November at Joplow and Manlow, in the County aforeſaid, which were Towns next the ſaid Town of Hitcham, within the ſaid Hundred, made Hue and Cry of the ſaid Robbery, and gave notice of the ſaid Robbery to the Inhabitants of the ſaid Towns of Joplow and Manlow, and after the ſaid Robbery, and within twenty days before the purchaſe of the Writ, ſcil. 19 day of February, Anno 5. at Dorney in the County aforeſaid, the Plaintiff before Sir William Gerrard Knight, then Juſtice of peace within the ſame County, an Inhabitant next to the ſaid Hundred, being examined upon his Oath, according to the Statute of 27 Eliz. the Plaintiff upon his Oath ſaid, That he did not know the parties who did rob him, nor any of them: And ſince the ſaid Robbery are forty days paſt, and the Inhabitants of the ſaid Hundred of Burnham, have not made amends of the ſaid Robbery to the Plaintiff, nor the body of the Felons and Wildoers aforeſaid, nor any of them have taken, nor anſwered their bodies, nor the bodies of any of them, but have ſuffered the Felons to eſcape, Sur Statute de Winton.

eſcape, to which the Defendants plead (not guilty) and a Venire facias was awarded to the Sheriff, De vicineto of the Hundred of Stoke, which is the Hundred next adjacent to the ſaid Hundred of Burnham: And the Jury gave a ſpecial Verdict, they found that the Plaintiff was robbed, and that he made Hue and Cry in manner and form, as he hath counted and found over, that the Plaintiff was ſworn before the ſaid Sir William Gerrard, then being a Juſtice of peace within the ſame County, and an Inhabitant next unto the Hundred of Burnham, and ſaid upon his Oath in theſe Engliſh words, That he, on Thurſday being the two and twentieth day of Novemb. 1608. riding under Hitcham Wood, in the Pariſh of Hitcham, within the Hundred of Burnham, was then and there ſet upon by two Horſe-men, which then, nor at this preſent he did, nor doth know, and by them robbed and ſpoiled of the juſt ſum of 25 l. 3 s. 2 d. ob. not without great danger of his life: But whether the ſaid Oath ſo taken is true, according to the form and effect of the ſaid Act of 27 Eliz. and according to the Count, the Jurors pray the direction of the Court.

Mich. 6. Jac.

Bonum publicum.

IN an action of Treſpaſs brought by Mouſe, for a Casket, and a hundred and thirteen pound, taken and carried away; the caſe was, The Ferry-man of Gravelend took forty ſeven Paſſengers into his Barge, to paſs to London, and Mouſe was one of them, and the Barge being upon the water, a great Tempeſt hapned, and a ſtrong wind, ſo that the Barge and all the Paſſengers were in danger to be drowned, if a Hogſhead of Wine and other ponderous things were not caſt out, for the ſafeguard of the Lives of the Men: It was reſolved *Per totam Curiam*, that in a caſe of neceſſity, for the ſaving of the lives of the Paſſengers, it was lawful to the Defendant being a Paſſenger to caſt the Casket of the Plaintiff out of the Barge, with the other things in it, for *Quod quis ob tutelam corporis ſui fecerit, jure id feciſſe videtur*, to which the Defendant pleads all this ſpecial matter; And the Plaintiff replies, *De injuria ſua propria abſque tali cauſa*: And the firſt day of this Term, this Iſſue was tried, and it was proved directly, that if the things had not been caſt out of the Barge, the Paſſengers had been drowned; and that *Levandi cauſa*, they were ejected, ſome by one Paſſenger and ſome by another; and upon this the Plaintiff was non-ſuit.

It was alſo reſolved, that although the Ferry-man ſurcharge the Barge, yet for ſafety of the lives of Paſſengers in ſuch a time and accident of neceſſity, it is lawful for any Paſſenger to caſt the things out of the Barge: And the Owners ſhall have their remedy upon the ſur-charge againſt the Ferry-man, for the fault was in him upon the ſur-charge: but if no ſur-charge was, but the danger accrued only by the act of God; as by tempeſt, no default being in the Ferry-man, every one ought to bear his loſs for ſafeguard of the life of a man, for *Intereſt Reipublicæ quod homines conſerventur*, 8 Ed. 4. 23. Bull, &c. 12 H. 8. 15. 28 H. 8. Dyer 36. plucking down of a Houſe, in time of fire, &c. And this *Pro bono publico, & conſervatio vitæ hominis eſt bonum publicum.* So if a Tempeſt ariſe in the Sea, *Levandæ navis cauſa*, and for the ſalvation of the lives of men, it may be lawful for Paſſengers to caſt over the merchandizes, &c.

Mich.

Mich. 5. Jac.

Prohibitions del Roy.

NOte, upon Sunday the tenth of November, in this same Term, the King, upon complaint made to him by Bancroft Archbishop of Canterbury, concerning Prohibitions, the King was informed, that when Question was made of what matters the Ecclesiastical Judges have cognizance, either upon the Exposition of the Statutes concerning Tythes, or any other thing Ecclesiastical, or upon the Statute 1 Eliz. concerning the High Commission, or in any other case in which there is not express Authority in Law, the King himself may decide it in his Royal person; and that the Judges are but the Delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself. And the Archbishop said, that it was clear in Divinity, that such Authority belongs to the King by the Word of God in the Scripture. To which it was answered by me, in the presence, and with the clear consent of all the Justices of England and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal, as Treason, Felony, &c. or betwixt party and party, concerning his Inheritance, Chattels, or Goods, &c. but this ought to be determined and adjudged in some Court of Justice, according to the Law and Custome of England, and always Judgments are given, Ideo consideratum est per Curiam, so that the Court gives the Judgment: And the King hath his Court, viz. in the upper House of Parliament, in which he with his Lords is the supream Judge over all other Judges; For if Error be in the Common pleas, that may be reversed in the Kings Bench: And if the Court of Kings Bench erre, that may be reversed in the Upper house of Parliament, by the King, with the assent of the Lords Spiritual and Temporal, without the Commons: And in this respect the King is called the Chief Justice, 20 H. 7. 7. a. by Brudnell: And it appears in our Books, that the King may sit in the Star-chamber; but this was to consult with the Justices, upon certain Questions proposed to them, and not in Judicio; So in the Kings Bench he may sit, but the Court gives the Judgment: And it is commonly said in our Books, that the King is always present in Court in the Judgment of Law; and upon this he cannot be non-suit: But the Judgments are always given per Curiam; and the Judges are sworn to execute Justice according to the Law and custome of England. And it appears by the Act of Parliament, of 2 Ed. 3. cap. 9. 2 Ed. 3. cap. 1. That neither by the Great Seal, nor by the Little Seal, Justice shall be delayed; ergo, the King cannot take any cause out of any of his Courts, and give Judgment upon it himself; but in his own cause he may stay it, as it doth appear, 11 H. 4. 8. And the Judges informed the King, that no King after the Conquest assumed to himself to give any Judgment in any cause whatsoever, which concerned the administration of Justice within this Realm; but these were solely determined in the Courts of Justice: And the King cannot arrest any man, as the Book is in 1 H. 7. 4. for the party cannot have remedy against the King; so if the

2 R. 3. 9. 21 H. 7. 8. 17 H. 6. 14. 39 Ed. 3. 14.

the King give any Judgment, what remedy can the party have, vide 39 Ed.3.14. One who had a Judgment reverſed before the Council of State: it was held utterly void, for that it was not a place where Judgment may be reverſed, vide 1 H. 7.4. Huſſey Chief Juſtice, who was Attorney to Ed. 4. reports, that Sir John Markham chief Juſtice ſaid to King Edw. 4. That the King cannot arreſt a man for ſuſpicion of Treaſon or Felony, as other of his Lieges may; for that if it be a wrong to the party grieved, he can have no remedy: And it was greatly marvelled that the Archbiſhop durſt inform the King, that ſuch abſolute power and authority as is aforeſaid, belonged to the King by the Word of God, vide 4 H.4. cap.22. which being tranſlated into Latin, the effect is, Judicia in Curia Regis reddita nón annihilentur, ſed ſtet judicium in ſuo robore quouſque per judicium Curiæ Regis tanquam erroneum,&c. vide Weſt.2. cap.5.vide le Stat.de Marlbridge.cap.1. Proviſum eſt, concordatum,& conceſſum, quod tam majores quam minores juſtitiam habeant & recipiant in Curia Domini Regis, & vide le Stat. de Mag.Charta. cap.29. 25 Ed. 3. cap.5. None may be taken by petition or ſuggeſtion made to our Lord the King or his Counſil, unleſs by Judgment: And 43 Ed. 3. cap. 3. no man ſhall be put to anſwer without preſentment before the Juſtices, matter of Record, or by due Proceſs, or by Writ Original, according to the ancient Law of the Land: And if any thing be done againſt it, it ſhall be void in Law and held for Error, vide 28 E.3. cap.3. 37 Ed. 3. cap.18. vide 17 R. 2. ex rotulis Parliamenti in Turri act.10. A controverſie of Land betwæn parties was heard by the King, and ſentence given, which was repealed, for this, that it did belong to the common Law: Then the King ſaid, that he thought the Law was founded upon reaſon, and that he and others had reaſon, as well as the Judges: To which it was anſwered by me, that true it was, that God had endowed his Majeſty with excellent Science and great endowments of Nature; but his Majeſty was not learned in the Laws of his Realm of England, and cauſes which concern the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by natural reaſon, but by the artificial reaſon and judgment of Law, which Law is an act which requires long ſtudy and experience, before that a man can attain to the cognizance of it; And that the Law was the golden Met-wand and meaſure to try the Cauſes of the Subjects; and which protected his Majeſty in ſafety and peace: With which the King was greatly offended, and ſaid, that then he ſhould be under the Law, which was Treaſon to affirm, as he ſaid; To which I ſaid, that Bracton ſaith, Quod Rex non debet eſſe ſub homine, ſed ſub Deo & Lege.

Mich.

Mich. 8. Iac. Regis.

Court Eccleſiaſticall. Prohibition.

IN this Term, in the caſe of one Roberts, a Prohibition had been granted in a caſe of ſubſtraction of Tithes, upon ſurmiſe that the Plaintiff being Defendant in the Spiritual Court, had but one Witneſs in that Court to prove his Demiſe; to which that Court ſaid, that Singularis teſtis is not allowable: And upon conſideration and ſight of a Prohibition granted upon the ſame cauſe in Hill. 3 Eliz. in banco Regis, it was reſolved by Coke chief Juſtice, Et totam Curiam in communi banco, that conſultation ſhould be granted, and that for divers cauſes.

1. It appears by the Regiſter fol. 5. that it is put for a rule, Quod non eſt conſonum rationi, quod cognitio acceſſorii in Curia Chriſtianitatis impediatur, ubi cognitio cauſæ principalis ad forum Eccleſiaſticum noſcitur pertinere: And with this agrees 1 R. 3, 4.

2. If ſuch a Surmiſe ſhall be allowed, then in every caſe for mere delay ſuch a Surmiſe may be made; for he who was Plaintiff in the Spiritual Court cannot deny, that where it is ſurmiſed that he hath one Witneſs, that he hath two or more, for then he affirms matter againſt himſelf: And when the Spiritual Court hath Juriſdiction of the principal Cauſe, they determine the acceſſory. But it was objected, that if A. claiming a Leaſe by B. of a Rectory, Libels for ſubſtraction of Tithes, and the Defendant pleads a former Leaſe made by B. and C. and the Defendant hath but one Witneſs in the caſe to prove the former Leaſe, if no Prohibition ſhall be granted, the Defendant ſhall be charged: And if C. ſue him upon the Statute of 2 Ed. 6. at the common Law, the teſtimony of one only will there be ſufficient, and ſo he ſhall be twice charged: To which it was anſwered, that firſt the fault was the Defendants, that he would not ſet forth his Tithes, and then he ſhall be charged whoſoever takes them: But in ſuch a caſe, thoſe of the Eccleſiaſticall Court will upon one good Witneſs, and any concurrent vehement preſumption, as poſſeſſion, or the like, allow of ſuch a proof: And the teſtimony of Witneſs in our Law is no concluſive evidence, but ought to be left to the conſcience of the Jury, and ſo the validity or invalidity of proof of matters of Fait ſhall be left to them: but if a queſtion of the Common Law ariſe from the party upon the conſtruction of a Statute, or the like, and thoſe of the Eccleſiaſtical Court will take upon them to judge of it againſt the rule of Law, there upon ſpecial ſurmiſe of it, and upon ſhewing of the anſwer or other pleadings of the parties, by which it appears to the Court, that ſuch ſurmiſe is a good ground, a Prohibition lies: for matter in Law, ariſing upon Eſtates or Intereſts done by the common Law and conſtruction of Statutes, ought to be determined according to the rules of common Law, Et non debet trahi ad aliud examen.

And Coke chief Juſtice cited a notable Judgment, Paſch. 35 Eliz. in banke le Roy. Fuller brought a Prohibition againſt Clements and Wiskard; and Fuller counted that he himſelf was Owner of the Rectory of Longham in the County of Norfolk, and libelled againſt Clements one of the Defendants, before the Official of the Biſhop of Norwich, for ſubſtraction of Tithes, ſcil. of Wheat, &c. pendent which Suit, the ſaid Wiskard, intervening Pro intereſſe ſuo, made theſe Allegations againſt the ſaid Fuller.

1. That the ſaid Rectory was impropriate to the Monaſtery of Wendling and by the diſſolution of the ſaid Monaſtery, came to the hands of H. 8. and did convey it by Mean diſcent to Quæn Eliz. who by her Letters Patents of concealment granted it to Min, and Hall, who enfeoffed Bozome who did let it to Wiskard for four years, and proved his Allegations by Witneſſes, upon which in fine, ſentence was given againſt Fuller, and eight pounds ten ſhillings given to Clements for coſts, and thirtæn pounds ſix ſhillings to Wiskard: And after Fuller did appeal to the Court of the Arches, and there Fuller claimed the ſaid Rectory by reaſon that Hall was ſeiſed of it and by his Dæd gave and granted the ſaid Rectory, and all Lands and Tithes to it appertaining, to Sir Edward Clere before the Feoffment ſuppoſed to be made to Bozome: And that Sir Edward Clere by his Dæd did enfeoff Fuller; and although that he offered to prove the delivery of the Dæd of the ſaid Feoffment made to Sir Edward Clere by one ſole Witneſs, the Eccleſiaſtical Court would not allow it, without producing another Witneſs: And Fuller further ſaid, that although he had further alledged there, that theſe were matters determinable at the Common Law, notwithſtanding they gave ſentence: the Defendants for to have a Conſultation pleaded, that Fuller in the ſaid Court of the Arches proved the Delivery of the Dæd aforeſaid, by Sir Edward Clere and Mouſe, but could not prove Livery and Seiſin according to the Deed: And for this cauſe ſentence was given, without that the Judges of the Arches would not admit the ſaid proof unleſs he proved the Dæd by other Witneſſes, upon which Fuller demurred in Law; and it was objected by the Council of Fuller,

1 That Wiskard, who is a mær ſtranger to the Suit, and who comes in Pro intereſſe ſuo in the ſaid Rectory, pleads matter meerly determinable at the common Law, ſcil. Letters Patents, Feoffment, and Leaſe for years; And on the other part Fuller claims an Eſtate in the ſaid Rectory by conveyance at the Common Law. And now the queſtion in the Eccleſiaſtical Court being only who hath the beſt Eſtate in the ſaid Rectory by the Common Law this ought to be tryed by the Common Law, and not in the Eccleſiaſtical Court, for this is the birth-right of the Subject to have his Inheritance and Free-hold tryed and determined by the common Law; for the Civil Law differs much in deciding of Inheritances.

2. It was objected, that all matters in Law ought to be determined by the Judges of the Law, and in this caſe matters of Law ariſing, ſcil. If a man hath a Rectory Impropriate, which conſiſts in Glebe and Tithes, and by his Deed gives and grants the ſaid Rectory, and all Lands and Tithes any way belonging or appertaining to it, to another and his heirs, and no Livery is made in this caſe, if the Tithes ſhall paſs, or no, for that Tithes may paſs without any Livery: This queſtion is not fit to be determined by the Eccleſiaſtical Judges, but by the Judges of the Common Law, Quod quiſque novit, in hoc ſe exerceat.

3. It was objected, that Wiskard was a meer ſtranger to the Suit, and all his Allegation is temporal, and for that it is a ſtronger caſe to maintain a Prohibition, forasmuch as betwixt him and Fuller nothing is in queſtion, but to whom the Inheritance of the Rectory belongs; But Clements, who is ſued for ſubtraction of Tithes, hath greater colour in his defence, being lawfully ſued in the Eccleſiaſtical Court, than for Wiskard, who is no party to the Suit for any Eccleſiaſtical cauſe, but all his Allegation, as hath bæn ſaid, is temporal.

4. It was objected, that Fuller had but one Witneſs to prove the delivery of the Dæd; and in the Eccleſiaſtical Law, Unus teſtis, eſt nullus teſtis, For all which cauſes it was prayed that the Prohibition may ſtand, and that no conſultation may be granted.

To

To which it was answered and resolved by Sir Christopher Wray chief Justice, and Per totam Curiam;

1. That to the first Objection, for that the Original belongs to the Ecclesiastical Court, the determination of all that which depends upon it belongs to the Judges of the same Court, although that the matter be tryable by the common Law: but where the Original matter belongs to the common Law, and there commenced, and issue be taken upon matter tryable by the Ecclesiastical Law, there the Judges of our Law shall write to the Judges of the Ecclesiastical Court to try it, and to certifie: and the reason of this diversity is, that our Judges having authority to write & command them by the Kings Writ to certifie them, but they cannot write to the Judges of our Law to try any thing, and to certifie them, for they have no such authority to command by Writ, but to obey the Writs of the King: As in any action Ancestral, if Bastardy be pleaded in the Demandant, and upon this issue is joyned, this shall be tryed by the Bishop, and his certificate shall bind: so in a Quare impedit, if issue be taken, whether a Clerk, which was presented was able, or not able, this shall be tryed by examination of a Clerk; and certified by the Bishop: but although that such issues are in their nature tryable by the Ecclesiastical Law, yet if the case was such, that the Ecclesiastical Court could not try it, then (to the end that Justice shall not be wanting) such Ecclesiastical matter shall be tryed by the common Law, as 4 Ed. 3. 26. if the Presentee be dead, if he was able, or not able, shall be tryed Per paiis; for the Bishop cannot try it: But against this was objected the Statute de Articulis Cleri cap. 13. by which it is provided, Quod de idoneitate Personæ præsentatæ ad beneficium Ecclesiasticum, pertineat examinatio ad Judicem Ecclesiasticum: upon which it was concluded, that the tryal De idoneitate personæ, in all cases belongs to the Court Christian. To which it was answered and resolved, that true it is, that the tryal of ability belongs to them; but the Statute explains it in what manner it shall be made, for the Statute saith, Pertinet examinatio ad Judicem Ecclesiasticum, so that this tryal ought to be by examination of the party, and this cannot be when the Presentæ is dead: And although he be not party to the Writ, yet he may be examined; And with this agræs 39 Ed. 3. 2. The Earl of Arundels case, and 4 Ed. 3. 25. 16 Eliz. Dyer 327. So if Bastardy be alledged in one who is not party to the Writ: there, for this, that the Certificate binds for ever, it should be against Law and reason that he should not be party to the Certificate; for this cause in such case it shall be tryed Per paijs, and if any difficulty ariseth upon it the Judges of our Law use to consult with the Judges Ecclesiastical: and with this accords 4 Ed. 3. 37. The same Law of profession, 42 Ed. 3. 5. 8. So if Bastardy be alledged in one who is dead, vide 17. Ed. 3. where Bastardy is alledged in the Tenent and one who is a stranger to the Writ, who are Sisters, vide, 32 Ed. 3. tryal 59. where the Tenant alledgeth Bastardy in himself, and the Demandant doth aver him Mulier, vide 29 Ass. pl. 14. 6. Eliz. Dy. 226. 228. If the Issue be Quod vacavit per relignationem, part of which is temporal and part spiritual, this shall be tryed Per paijs, vide 9 H. 7. Profession and the time of it, &c. But admission and institution, although that it be alledged in a stranger to the Writ, yet this shall be tryed by the Ordinary; as it appears 7 Ed. 6. 78. 6. in Dyer, for admission, Institution, Resignation, Et similia, are judicial acts, and remain in their Courts and Register, upon which they ground their Certificate, otherwise it is of Bastardy, Idoneity, &c. By which it appears, that in divers cases the Judges of the Common Law write to the Ecclesiastical Judges, commanding them to certifie some thing put in issue; and the Judges of our Law prohi-

bite the Judges Ecclesiastical to hold Plea of some things which are determinable at Common Law; But the Court Ecclesiastical hath not power to write to our Judges, or to command them, or to prohibite them when they hold plea of things determinable by the Ecclesiastical Judges; but this is erroneous, and shall be reversed by Error. And of the other side, if in the Ecclesiastical Court the Suit is for a Legacy, and the Defendant plead a Release, if in the admitting or rejecting of proofs concerning this Release, which is matter determinable at Common Law, they do wrong to the Plaintiff or Defendant, they have no remedy but by way of appeal.

2. To the second it was answered and resolved, that if upon Consultation with men learned in the Law, they give sentence according to Law, this is well done, and no prohibition ought to be granted, but if they take upon them to draw the Interest of any man, Ad aliud examen, and to judge against the Rule of Law, concerning the Inheritance or Interest of any, there Prohibition lies: And in the case at the Bar, they well resolved the Law, for by the said Livery of the Charter the Tithes do not pass as in grosse, for this, that the intention of the parties was to pass the intire Rectory by Feoffment, and not to pass the Tithes by the same, and so to dismember the Rectory by Fractions, and that by construction of Law, against the intention of the parties. 129

3. As to the third, it was answered and resolved, that by the Ecclesiastical Law, a stranger may come in Pro interesse suo; And when they have jurisdiction of the Original cause of the Suit, we ought not to draw in question their order and proceeding, but if they proceed inverso ordine, or not observing form, this ought to be redressed by appeal: And although that the matter depending upon the Original cause be determinable by the Common Law, yet it shall be determined, as it hath been said, in the Ecclesiastical Court.

4. As to the fourth objection, it was answered and resolved, that such a Surmise, that he hath but one Witness, is not sufficient to have a Prohibition, for this, that the Ecclesiastical Court hath Jurisdiction of the Principle, and if such a Surmise shall be sufficient, all Suits in the Ecclesiastical Court shall be either delayed, or quite taken away, for such a Surmise may be made in every case; and the Plaintiff in the Ecclesiastical Court cannot have any good answer to it to have a consultation, which agrees with the resolution in the principal Case, &c.

witness coäet usurious.

It was resolved, upon evidence, by Coke chief Justice De banco, inter I. S. who informed upon the Statute of Usury, and Smith, that the parties to the supposed usurious Contract shall not be admitted Witnesses, for this, that upon the matter they were Testes in propria causa, and by their Oath shall avoid their Bond, &c. or shall be revenged on him who lent them the mony, before they are enforced to repay it: And for the most part they incite, and raile up one of their own Servants, to inform and have part of the thing recovered.

High

High Commiſſioners.

Trin. 8. Jacobi Regis.

UPon a **Habeas Corpus** by **Eliz.** Lady **Throgmorton**, Priſoner in the Fleet, the return was, the Lady **Throgmorton** was committed by **George Biſhop** of **London** and others Eccleſiaſtical Commiſſioners, under their hands, till further order ſhould be taken for her enlargement: And the cauſe of commitment of her was, for that ſhe had done many evil offices betwixt Sir **James Scudamore**, and her Daughter the Lady **Scudamore**, Wife of the ſaid **James**, and to make ſeparation betwixt them, and detained her from her Huſband: And upon her departure after ſentence before the Commiſſioners, for divers contemptuous words againſt the Court, ſaying, that ſhe had neither Law nor Juſtice there: And it was reſolved, that for detaining of the Wife, and endeavoring to make ſeparation, no Suit can be before the high Commiſſioners, for that it is not any enormous offence within the meaning of the Act.

2. For the detaining of the Wife, there is remedy by the Common Law.

3. Without Queſtion, for ſuch an Offence they cannot Impriſon the Wife.

4. By the words it doth not appear, that they were ſpoken in the Court.

Secondly, It is no Court of Record, for that they proceed according to the Civil Law, and it is like the Admiralty Court; and for this they cannot Impriſon, for none ſhall be Committed for miſdemeanour in Court, unleſs that the Court be of Record.

5. It doth not appear by the return what Court this was; which is uncertain; And upon this, upon good conſideration ſhe was bayled.

But **Kandal** and **Hitkings** was this very Term committed by the high Commiſſioners, for that they were vehemently ſuſpected to be Browniſts, &c. And they obtained a **Habeas Corpus**, and were remanded for this, that the high Commiſſioners have power to commit for Hereſie. *Quere.*

The Lord of Aburgavenie's *Caſe.*

IN the Parliament a Queſtion Was made by the Lord of Northampton, Lord privy Seal, in the Upper houſe of Parliament: That one Edward Nevil, the father of Edward Nevil. Lord of Aburgaveny, which now is, in the 2, and 3. of Queen MARY, was called by Writ to Parliament, and dyed before the Parliament: If he was a Baron, or no, and ſo ought to be named, was the Queſtion. And it was reſolved by the Lord Chancellor, the two chief Juſtices, chief Baron, and divers other Juſtices there preſent, that the direction and delivery of the Writ did not make a Baron or Noble, until he did come unto Parliament, and there ſit, according to the commandment of the Writ; for untill that, the Writ did not take its effect, and the words of the Writ were well penned, which are, Rex & Regina, &c. Edwardo Nevil de Aburgaveney Chivalier, Quia de adviſamento & aſſenſu concilii noſtri pro quibuſdam arduis, & urgentibus negotiis ſtatum & defenſionem Regni noſtri Angliæ concernentibus, quoddam Parliamentum

The Writ doth not make a Peer, &c.

Parliamentum noſtrum apud Weſtmonaſterium, 21. die Octobris proximo futuro teneri ordinavimus, & ibidem vobiſcum, ac cum Prelatis, Magnatibus & Proceribus dicti regni noſtri colloquium habere & tractatum: Vobis in fide & Ligeantia, quibus nobis tenemini, firmiter injungendo mandamus, quod conſideratis dictorum negotiorum arduitate & periculis imminentibus, ceſſante excuſatione quacunque, dictis die & loco perſonaliter interſitis nobiſcum, ac cum Prælatis, Magnatibus ac Proceribus ſupradictis, ſuper dictis negotiis tractaturi, veſtrumque conſilium impenſuri, & hoc ſicut nobis, &c. And in the 35 H. 6. 46. and other Books, he is called a Peer of Parliament, the which he cannot be until he ſit in Parliament, and he cannot be of the Parliament until the Parliament begin: And foraſmuch as he hath been made a Peer of Parliament by Writ (by which implicitly he is a Baron) the Writ hath not its operation and effect, untill he ſit in Parliament, there to conſult with the King and the other Nobles of the Realm; which command of the King by his Superſedeas may be countermanded, or the ſaid Edward Nevil might have excuſed himſelf to the King, or he might have waved it, and ſubmitted himſelf to his Fine; as one who is diſtrained to be a Knight, or one learned in the Law is called to be a Serjeant, the Writ cannot make him a Knight, or a Serjeant; And when one is called by Writ to Parliament, the Order is, that he be apparelled in his Parliament Robes, and his Writ is openly read in the Upper houſe, and he is brought into his place by two Lords of Parliament, and then he is adjudged in Law, Inter pares Regni, that is to ſay, ut cum olim Senatores e cenſu eligebantur, ſic Barones apud nos habiti fuerint, qui per integram Baroniam terras ſuas tenebant, ſive 13. feoda militum, & tertiam partem unius Feodi militis, quolibet Feodo computato ad 20 l. quæ faciunt 400. marcas denarii erat valentia unius Baroniæ integræ, & qui terras & redditus ad hanc valentiam habuerint, ad Parliamentum ſummoneri ſolebant; So that by this it appears, that every one who hath an entire Barony may have of right and of courſe a Writ to be ſummoned to Parliament, for without Writ none can ſit in Parliament: And with this agree our Books, for Una voce they agree, that none can ſit in Parliament as Peer of the Realm, without matter of Record, and if Iſſue be taken, whether a Baron or no Baron, Earl or no Earl, this ſhall not be tryed Par paiis, but by the Record, by which it appears, that he was a Peer of Parliament: for without matter of Record, he cannot be a Peer of Parliament, 35 H. 6. 46. 48 Ed. 3. 30. b. 48. Aſſ. pl. 6. 22 Aſſ. pl. 24. Regiſter, 287. Henricus tertius poſt magnas perturbationes & enormes exactiones inter ipſum Regem, Simonem de monte forti, & alios Barones motas & ſuſceptas, ſtatuit & ordinavit, quod omnes illi Comites & Barones Regni Angliæ, quibus ipſe Rex dignatus eſt brevia ſummonitionis dirigere, venirent ad Parliamentum, & non alii niſi forte Dominus Rex alia illa brevia eis dirigere voluiſſet: Which Act or Statute continues in force to this day, ſo that now none, although that he hath an entire Barony can have a Writ of Summons to Parliament without the Kings Warrant, under the Privy Seal at leaſt.

But if the King create any Baron by Letters Patents under the Great Seal to him and to his Heirs, or to him and to his Heirs of his body, or for life, &c. there he is a noble man preſently; for ſo he is expreſly created by Letters Patents of the King, which cannot be countermanded And he ought to have a Writ of Summons to Parliament of right and of courſe, and he ſhall be tryed by his Peers, if he ſhall be arrained before any Parliament, but ſo ſhall not he be who is called by Writ, untill he ſits in Parliament, which is the diverſity.

Richard the ſecond, created John Beauchamp of Holt, Baron of Kederminſter, by Letters Patents, dated 10 Oct. 11. year of his Reign, where all others before him were created by Writ.

Trin.

Trin. 8. Jac.

IN this very Term Thomas Oldfield came out of the Court of the Dutchy, and before he came into Weſtminſter Hall, with a Knife ſtabbed one Ferrar, a Juſtice of Peace, of which he dyed: And if Oldfield ſhould have his right hand cut off, was the queſtion before the two chief Juſtices, chief Baron, Walmſley, Warberton, Foſter, and divers other Juſtices. And it was reſolved, No; for it ought to be in the Hall of Weſtminſter, Sedentibus Curiis, as it appears in 3 Eliz. Dyer 188. 41 Ed. 3. title Coron. 280. And a Precedent was ſhewn, An. 9 Eliz. in Banco le Roy, where one Robert Gerling ſmote one in Whitehall, ſitting in the Court of Requeſts, and was but fined and ranſomed: The ſame Law if one ſmite one in the Court of the Dutchy, &c. But if one ſmite another before the Juſtices of Aſſiſe, there his right-hand ſhall be cut off, as it appears, 22 Ed. 3. fol. 13, and 19 Ed. 3. title Judgment. And one Bellingham, An. 2 Jac. in the Hall of Weſtminſter, Sedentibus Curiis, with his elbow and ſhoulder out of malice juſtled Anthony Dyer of the Inner Temple, ſo that he over-threw him, and with his feet ſpurned him upon his Leggs, but did not ſmite him neither with his hand, nor with any Weapon: And yet it was held that his right hand ſhould be cut off, &c. upon which Bellingham was indicted in Banc le Roy, and after obtained his pardon.

A Caſe was put to all the Juſtices of England, which was ſuch; The Biſhoprick of Waterford and Liſmore, being originally two Biſhopricks diſtinct, were by lawful authority in the Reign of H. 3. united and conſolidated, but the Chapiters yet remain ſeveral: After which union the Biſhop aliened Lands of the See of Waterford, and aliened Lands of the See of Liſmore, with the confirmation of the Chapiter of Liſmore, the Queſtion was, whether ſuch Alienations are not voidable by the Succeſſor; being without the confirmations of both the Deans and Chapiters. The ſecond Queſtion was, whether the Queen might avoid ſuch alienations Contra formam collationis, by Seiſure, or otherwiſe: And the Juſtices demanded a view of the Union; to which it was anſwered, That it was not extant, then it was reſolved by the Juſtices: that in aſmuch as the uſage hath been after the ſaid union, that the ſeveral Deans and Chapiters have ſeverally made confirmations, ut ſupra; it ſhall be intended that the Union was made eſpecially in ſuch manner, ſcil. That notwithſtanding the Union, yet for avoiding of confuſion, and in reſpect of the remoteneſs of the Deaneries and Chapiters, that Eſtates made ſhall be ſeverally confirmed, as before the Union, and then ſuch confirmation ſhall be good, for in ſuch caſe, Modus & conventio vincunt Legem: but if the Union was made generally, and the Biſhop eligible by both Chapiters, then Eſtates made, ought to be confirmed by both the Chapiters, vide 50. Ed. 3. title Aſſiſe Statham, the time of R. 2. title Grant, 27 H. 8. Dyer 58. 11 Eliz. Dyer, 33 H. 8. cap.

It was reſolved, that upon a lawful Alienation made with confirmation of the Dean and Chapiter, no Contra formam collationis lyeth upon the Statute of Weſtmin. 2. as hath been reſolved in the ſeventh part of my Reports.

Trin.

Trin. 8. Jac.

Convocation.

NOte, it was reſolved by the two chief Juſtices and divers other Juſtices, at a Committee before the Lords in the ſame Parliament, divers points concerning the authority of a Convocation.

1. That a Convocation cannot aſſemble at their Convocation, without the aſſent of the King.

2. That after their aſſembly they cannot confer to conſtitute any Canons, without licenſe del Roy.

3. When they upon conference conclude any Canons, yet they cannot execute any of their Canons without Royal aſſent.

4. They cannot execute any after Royal aſſent, but with theſe four limitations.

1. That they be not againſt the Prerogative of the King.
2. Not againſt the Common Law.
3. Nor againſt any Statute Law.
4. Nor againſt any Cuſtome of the Realm.

And all this appears by the Statute 25 H. 8. cap. 19. and this was but an affirmance of what was before the ſaid Statute, for that it appears by the 19 Ed. 3. title. Quare non admiſit. 7. where it is held; that if a Canon Law be againſt the Law of the Land, the Biſhop ought to obey the Commandment of the King, according to the Law of the Land, 10. H. 7. 17. there is a Canon that no Spiritual perſon ſhall be put to anſwer before a ſecular Judge; But this doth not bind, becauſe it is againſt the common Law; And it appears by the Statute of Morton cap. 9. that they in caſe of Baſtardy were enforced to certifie againſt the Law of holy Church, that Nati ante matrimonium ſuerint Baſtardi, quia Eccleſia habet tales pro legitimis, & rogaverunt omnes Epiſcopi, Magnates quod conſentirent, quod qui nati ſuerint ante matrimonium eſſent legitimi, which proves, that the Canon Law in this point being repugnant to the Law of the Land, was not of any force: And for this, they implored the aid of the Parliament, Et omnes Comites & barones una voce reſponderunt, quod nolumus leges Angliæ mutare, quæ huc uſque uſitatæ ſunt & approbatæ.

2 H. 6. 13. A Convocation may make Conſtitutions, by which thoſe of the Spiritual ſhall be bound for this, that they all, or by repreſentation, or in perſon are preſent, but not the temporalty.

21 Ed. 4. 47. The Convocation is Spiritual, and all their Conſtitutions are Spiritual, vide the Records in the Tower of 18. H. 8. 8 Ed. 1. 25. Ed. 1. 11, d. 2. & 15. Ed. 2.

Prohibitio Regis ne Clerus in Congregatione ſua, &c. attemptet contra jus ſeu Coronam: nalia, Ne quod ſtatuat in Concilio ſuo in præjudicium Regis ſeu legis, &c. By which it appears, that they can do nothing againſt the Law of the Land; for every part of the Law, be it Common Law, or Statute Law, cannot be abrogated nor altered without an Act of Parliament, to which every one ſhall be party, except the Spiritual Cauſes, or which concerns Spiritual perſons, if it be againſt the Prerogative of the King and the Common Law.

Piracy, Trin. 8. Jac.

IN this very Term the King referred the consideration of Letters Patents of the Lord Admiral of England, to the two chief Justices, and the chief Baron, whether by the said Letters Patents, the Goods which Pirates should take from others by Robbery and Piracy did pass to the Lord Admiral, or no? And upon the consideration of the said Letters Patents it appeared to us, that he had Bona & Chattalla piratarum, and also Bona & Chattalla deprædata, id est, the Goods robbed from others: which did not pass for two Causes.

1. If the King grant Bona & Chattalla felonum, the Patentee shall have the Goods and Chattels of the Felon himself, in which he hath property; but he shall not have the Goods and Chattels which the Felon stealeth from others.

2. The Goods taken from others the King cannot grant, for it appears by the Statute 27 Ed.3.cap.8. St. 2. that the Merchant, &c. so robbed shall be received to prove, that the Goods and Chattels belong to him by his Chart or Cocket, or by other lawful proof of Merchants, &c. the said Goods shall be delivered without any Suit at the Common Law, which Act is general, be the Robber privy or a stranger: But it was resolved, that until such proof be made, the King may seize the said Goods; for Goods of which the property is unknown, the King may seize; And if they are Bona peritura, the King may sell them, and, upon proof, &c. restore the value. And note, the Statute doth not limit the Owner in case of depredation to any certain time to prove the property of the same Goods, as ought to be in case of Wreck, vide Stat. 31 H.6. cap.4. vide 2 R. 2. cap.2. 13 Ed.4.9,10. a good resolution of the Justices. And the Register 129. F. N.B.114. when a Subject of the King, who is spoiled beyond the Seas shall have a Writ, &c. for to take Goods within England, &c.

Simony, Trin. 8. Jac.

IT was agreed ad mensam, by all the Justices and Barons in Fleetstreet, that if the Patron, for any mony, present any person to any Benefice with cure, &c. that then every such presentation and the admission, institution, and induction thereupon are void, although that the Presentee be not party nor privy to it: for the Statute intends to punish the wicked avarice of corrupt exactions by the loss of his Presentation hac vice, and the Statute gives the Presentation to the Quæn: And all this per verba Statuti, which is penned strongly enough against corrupt Patrons.

Proclamations, Mich. 8. Jacobi.

Proclamation cannot make that an offence which was not.

MEmorand. That upon Thurſday, 20 Sept. 8. Regis Jacobi, I was ſent for to attend the Lord Chancellor, Lord Treaſurer, Lord privy Seal, and the Chancellor of the Dutchy; there being preſent the Attorney, the Solliciter, and Recorder: And two queſtions were moved to me by the Lord Treaſurer; the one, If the King by his Proclamation may prohibit new Buildings in and about London, &c. The other, if the King may prohibit the making of Starch of Wheat; And the Lord Treaſurer ſaid, that theſe were preferred to the King as grievances, and againſt the Law, and Juſtice: And the King hath anſwered, that he will confer with his privy Council, and his Judges, and then he will do right to them. To which I anſwered, That theſe queſtions were of great importance. 2. That they concerned the anſwer of the King to the body, viz. to the Commons of the Houſe of Parliament. 3. That I did not hear of theſe queſtions until this morning, at nine of the Clock; for the grievances were preferred, and the anſwer made, when I was in my Circuit. And laſtly, both the Proclamations, which now were ſhewed, were promulgated, An. 5 Jac. after my time of Attorneyſhip: And for theſe reaſons I did humbly deſire them that I might have conference with my Brethren the Judges about the anſwer of the King, and then to make an adviſed anſwer according to Law and reaſon. To which the Lord Chancellor ſaid, That every Preſident had firſt a commencement, and that he would adviſe the Judges to maintain the power and Prerogative of the King; and in caſes in which there is no authority and Preſident, to leave it to the King to order in it according to his wiſdom, and for the good of his Subjects, or otherwiſe the King would be no more than the Duke of Venice; And that the King was ſo much reſtrained in his Prerogative, that it was to be feared the bonds would be broken: And the Lord privy Seal ſaid, that the Phyſician was not always bound to a Preſident, but to apply his Medicine according to the quality of the diſeaſe: And all concluded that it ſhould be neceſſary at that time to confirm the Kings Prerogative with our Opinions, although that there were not any former Preſident or Authority in Law; for every Preſident ought to have a Commencement.

To which I anſwered, That true it is, that every Preſident hath a commencement; but when authority and Preſident is wanting, there is need of great conſiderations, before that any thing of novelty ſhall be eſtabliſhed, and to provide that this be not againſt the Law of the Land: for I ſaid, that the King cannot change any part of the Common Law, nor create any offence by his Proclamation, which was not an Offence before, without Parliament. But at this time I only deſire to have a time of conſideration and conference with my Brothers, for Deliberandum eſt diu, quod ſtatuendum eſt ſemel; To which the Solliciter ſaid, that divers Sentences were given in the Star Chamber upon the Proclamation againſt building; and that I my ſelf had given ſentence in divers caſes againſt the ſaid Proclamation: to which I anſwered, That Preſidents were to be ſeen, and conſiderations to be had of this upon conference with my Brethren, for that Melius eſt recurrere, quam male currere; And the Indictment concludes, Contra leges & ſtatuta; but I never heard an Indictment to conclude, Contra Regiam Proclamationem. And at laſt my motion was allowed, and the Lords appointed the two chief Juſtices, chief Baron, and Baron Altham to have conſideration of it.

Note,

Note, the King by his Proclamation, or other ways, cannot change any part of the Common Law, or Statute of Law, or the Customs of the Realm, 11 H.4.37. Fortescue in laudibus Angliæ legum, cap.9 18 Ed. 4.35, 36.&c. 31 H.8.cap.8.hic infra: Also the King cannot create any Offence by his Prohibition or Proclamation, which was not an Offence before, for that was to change the Law, and to make an Offence which was not: for, Ubi non est lex, ibi non est transgressio; ergo, that which cannot be punished without Proclamation, cannot be punished with it, vide le Stat. 31 H. 8. cap.8. which Act gives more power to the King than he had before, and yet there it is declared, that Proclamations shall not alter the Law, Statutes, or Customs of the Realm, or impeach any in his Inheritance, Goods, body, life, &c. But if a man be indicted for a contempt against a Proclamation, he shall be fined and imprisoned, and so impeached in his body and goods, vide Fortescue, cap.9.18.34.36,37,&c.

But a thing which is punishable by the Law, by fine, and imprisonment, if the King prohibit it by his Proclamation, before that he will punish it, and so warn his Subjects of the peril of it, there, if he permit it after, this as a Circumstance aggravates the Offence; But he by Proclamation cannot make a thing unlawful, which was permitted by the Law before: And this was well proved by the ancient and continual forms of Indictments, for all Indictments conclude, Contra legem & consuetudinem Angliæ, or contra leges & Statuta, &c. But never was seen any Indictment to conclude Contra Regiam proclamationem.

So in all cases the King out of his providence, and to prevent dangers, which it will be too late to prevent afterwards, he may prohibit them before, which will aggravate the Offence, if it be afterwards committed: And as it is a grand Prerogative of the King to make Proclamation (for no Subject can make it without authority from the King, or lawful Custome) upon pain of fine and imprisonment, as it is held in the 22 H. 8. Procl.B. but we do find divers presidents of Proclamations which are utterly against Law and reason, and for that void; for, Quæ contra rationem Juris introducta sunt, non debent trahi in consequentiam.

An Act was made, by which Forreigners were licensed to Merchandize within London, H. 4. by Proclamation prohibited the execution of it: and that it should be in suspence Usque ad proximum Parliamentum, which was against Law, vide dors. claus.8. H. 4. Proclamat. in London: But 9 H. 4. An Act of Parliament was made, That all the Irish people should depart the Realm, and go into Ireland before the Feast of the Nativity of the blessed Lady, upon pain of death, which was absolutely in terrorem, and was utterly against the Law.

Hollinshead 722. An. Dom. 1546. 37 H. 8. the Whore-houses called the Stews, were suppressed by Proclamation, and sound of Trumpet, &c.

In the same Term it was resolved by the two chief Justices, chief Baron, and Baron Altham, upon conference betwixt the Lords of the privy Council and them, that the King by his Proclamation cannot create any Offence which was not an Offence before, for then he may alter the Law of the Land by his Proclamation in a high point; for if he may create an Offence where none is, upon that ensues fine and imprisonment: Also the Law of England is divided into three parts, Common Law, Statute Law, and Custome; But the Kings Proclamation is none of them: Also Malum, aut est malum in se, aut prohibitum, that which is against Law is malum in se; malum prohibitum is such an Offence as is prohibited by Act of Parliament, and not by Proclamation.

Also it was resolved, that the King hath no Prerogative, but that which the Law of the Land allows him.

But the King for prevention of Offences, may by Proclamation admonish his Subjects that they keep the Laws, and do not offend them; upon punishment to be inflicted by the Law, &c.

Lastly, if the Offence be not punishable in the Star-Chamber, the Prohibition of it by Proclamation cannot make it punishable there: And after this resolution, no Proclamation imposing Fine and Imprisonment was afterwards made, &c.

Mich. 8. Jac.

No Prohibition after the Writ *De excommunicato capiendo.*

NOte, it was resolved in the same Term, that if a man be excommunicated by the Ordinary, where he ought not to be, as after a general pardon, &c. and the Defendant being negligent doth not sue a Prohibition, but remains excommunicate by forty days, and upon Certificate in Chancery, he is taken by the Kings Writ De excommunicato capiendo, that no Prohibition lies in this case, for that he is taken by the Kings Writ, and no president or authority can be found where a Prohibition was granted after the party was taken by the Kings Writ; for Prohibition lies to prohibit Ecclesiastical proceedings, not any thing which is done by the Kings Writ by force of the Common Law; and if a Prohibition be granted, it will not deliver the party: Then it was moved, what remedy hath the party who is so wrongfully excommunicated? To which it was answered, that he hath three remedies, viz.

1. He may have a Writ out of Chancery to absolve him; for as it is held in 14 H. 4. fol. 14. In all cases where a man is excommunicated by the Bishop against our Law, he shall have a Writ out of the Chancery directed to the Bishop, commanding him to assoil him: And with this agrees 7 Ed. 4. 14.

2. When a man is excommunicated against the Law of this Realm, so that he cannot have a Writ de Cautione admittenda, for then he ought Parere mandatis Ecclesiæ in forma Juris, id est, Ecclesiastici, where in truth it is, Excommunicatio contra jus & formam Juris, id est, communis juris: But if he shew his cause to the Bishop, and request him to assoil him, for this, that he was excommunicated after the Offence was pardoned, or for this, that the cause doth not appear to Ecclesiastical Cognizance, and he refuse to assoil him, so that he is now disabled to sue any Writ of the King, so long as he remains excommunicated, he may have an Action Sur le case against the Ordinary, who hath done him this wrong, to disable him in this case; and with this agrees the Dr. & Stud. lib. 2. cap. 32. fol. 119.

3. If the party be excommunicated for none of the causes mentioned in the Act of 5 Eliz. cap. 23. then he may have this for plea in the Kings Bench by the same Act, and avoid the penalties inflicted by the same Act.

Note, It was resolved by the Court, &c. that where one is cited before the Dean of the Arches in cause of defamation, for calling the Plaintiff Whore, out of the proper Dioces, scil. the Dioces of LONDON against the Statute of 23 H. 8. and the Plaintiff hath sentence, and the Defendant is excommunicated, and so continues eight days: And upon Certificate into the Chancery, a Writ of Excommunicato capiendo is granted, and after the Defendant is taken and imprisoned by force of it, that he shall not have a Prohibition upon the Statute 23 H. 8. for no Writ in the Register

Regiſter extends to it, Et ſententia, ſi quam fulminaveritis, ſine dilatione revocetis, and after ſentence is appealed, and Prohibition lies, as appears by the Regiſter; But no Writ nor Preſident can be ſhewn in this caſe, but there is a Writ in the Regiſter called a Writ De cautione admittenda, when the Defendant is taken by the Kings Writ De Excommunicato capiendo, de parendo mandatis Eccleſiæ, and to aſſoil and deliver the Defendant: But note a diverſity, where it appears to the Court, that the matter of the Libel is not within their Juriſdictions, as of Ley-fæ, or of Ley-contract, &c. there lies a Prohibition with clauſe to deliver the party, for there he cannot find caution De parendo mandatis Eccleſiæ, for this, that Mandata Eccleſiæ, are contra legem & extra juriſdictionem ſuam: But in the caſe at the Bar, although it appears by the Libel, that the Defendant was of one ſuch Pariſh in London, yet inaſmuch as the Statute, 23 H. 8. hath many exceptions, ſcil. That the Ordinary requeſt the Archbiſhop, &c. to examine the caſe, &c. ſo that the ſaid defamation being the matter of the Libel, is of Eccleſiaſtical Cognizance, and the Statute hath many exceptions, ſo that it doth not appear to us judicially without information, that the Citation is againſt the form of the Statute; and this information comes too late in this caſe after the Defendant hath perſiſted ſo long in his contumacy, and is taken by the Kings Writ and impriſoned.

Admiralty.

IT was reſolved per totam Curiam, that if one be ſued in the Admiralty Court for a thing alledged to be done upon the high Sea, within the Juriſdiction of the Admiral, and the Defendant plead to it, and confeſs the thing to be done, and after ſentence is given the Court will be adviſed to grant a Prohibition, upon Surmiſe, that it was done Infra corpus Comitatus, againſt their own confeſſion, unleſs it can be made to appear to the Court by any matter in writing, or other good matter, that this was done upon the Land, for otherwiſe every one will ſtay until after ſentence: And then for vexation only ſue out a Prohibition; for although the admittance of the party cannot give a Juriſdiction to the Court where it of Right hath none, for that it will be an encroachment upon the Common Law; yet when the Court ſhall be adviſed that this is meerly for vexation, and ſhall be intended for delay, if the Prohibition ſhall not be ſued forth till after ſentence; unleſs that he can ſhew good matter to the Court, to aſcertain the Court that this is not for vexation, it ſhall not be granted. And admonition was given to them which ſue forth Prohibitions, that they ſhould not keep them by long time in their hands, and notwithſtanding proceed in the Eccleſiaſtical Court, &c. and when they perceive that they cannot prevail, then to caſt in their Prohibitions; for if they abuſe that liberty to the dammage and vexation of the party, we will take ſuch order as in caſe of a Writ of Priviledge, if the Defendant keep it untill the Jurors are ready, &c. it ſhall not be allowed.

The Court cannot grant Prohibition after ſentence.

Hill. 8. Jac.

IN this very Term in the caſe of Doctor Trevor, who was Chancellor of a Biſhop in Wales, it was reſolved, that the Office of a Chancellor and Regiſter, &c. in the Eccleſiaſtical Courts, are within the Statute 5 Edw. 6. cap. 16. the words of which Statute are, Any Office, &c. which ſhall in any wiſe touch or concern the Adminiſtration or Execution of Juſtice; and the words are ſtrongly penned againſt corruption of Officers, for they are, Which ſhall in any wiſe touch or concern the Adminiſtration, &c. and the Preamble; And for avoiding of corruption, which may hereafter happen to be in the Officers and Miniſters of thoſe Courts, Places and Rooms, wherein there is requiſite to be had the true adminiſtration of Juſtice, in ſervices of truſt: And to the intent, that perſons worthy and meet to be advanced to the place where Juſtice is to be miniſtred, in any ſervice of truſt to be executed, ſhould be preferred to the ſame, and none other. Which Act being made for avoiding of corruption in Officers, &c. and for the advancement of perſons more worthy and ſufficient for to execute the ſaid Offices, by which Juſtice and Right ſhall be alſo advanced, ſhall be expounded moſt beneficially to ſuppreſs corruption. And inaſmuch as the Law allows Eccleſiaſtical Courts to proceed in caſe of Blaſphemy, Hereſie, Schiſm, Incontinence, &c. and the loyalty of Matrimonies, of Divorce, of the right of Tythes, probat of Wills, granting of Adminiſtrations, &c. And that from theſe proceedings depend not only the ſalvation of Souls, but alſo the Legitimation of Iſſues, &c. and that no debt or duty can be recovered by Executors or Adminiſtrators, without the probat of Teſtaments, or Letters of Adminiſtration, and other things of great conſequence; It is moſt reaſon that ſuch Officers, which concern the adminiſtration and execution of Juſtice in theſe points, which concern the ſalvation of Souls, and the other matters aforeſaid, ſhall be within this Statute, then Officers which concern the adminiſtration or execution of Juſtice in Temporal matters; for this, that corruption of Officers in the ſaid Spiritual and Eccleſiaſtical cauſes is more dangerous, then the Officers in Temporal cauſes; for the Temporal Judge commits the party convict to the Goaler; but the Spiritual Judge commits the perſon excommunicate to the Devil. Alſo thoſe Officers do not only touch and concern the adminiſtration of Juſtice, &c. but alſo are Services of great truſt, for this, that the Principal end of their proceedings is, Pro ſalute animarum, &c. and there is no exception or proviſo in the Statute for them.

It was reſolved, that ſuch Offices were within the Purview of the ſaid Statute.

Hill.

Hill. 8. Jacobi Regis.

IT is to be underſtood, that the Jurisdiction of the Admiralty is more ancient then Mr. Lambert in his Jurisdiction of Courts doth affirm, for there is held an opinion in theſe words concerning the Admiralty; I think that the Decision of Marine cauſes was not put out of the Kings houſe, and committed over to the charge of the Admiral, until the time of Ed. 3. whereunto I am led, partly by the conſideration of the time of his Reign, which was much occupied in affairs beyond the Seas, and by reaſon of his Wars with France, and of the intercourſe and trade of Merchandize, which then flouriſhed; and partly, for that I find no mention of the Admiralty before the Reign of R. 2. who going about by a Statute, made the thirteenth year of his Reign, to reſtrain the authority of that Court which had exceeded her known limits, doth take order, that it ſhould meddle no more than it was wont to do in the time of his Grandfather Edw. 3. thereby reducing its authority, as I think, to the firſt Original (hoc ille): But without queſtion the Jurisdiction of the Admiralty is more ancient than the Reign of the ſaid King Edw. 3. For where it is ſaid, that there is found no mention of it before the time of Edw. 3. I find a notable Book in the time of Edw. 1. title Avowry 192. which proves the Jurisdiction of the Admiralty more ancient than Mr. Lambert ſuppoſeth: The Caſe was, One brought a Replevin of his Ship taken on the Coaſt of Scarborough, upon the Sea, and carried into a County of Norfolk, and there detained: The Plaint of taking in the Coaſt of Scarborough, upon the Sea, which is no Town or place certain by which the Pais may be taken; for the Coaſt contains four Leagues. And alſo of a thing done at Sea, this Court cannot have Cognizances, for this Judgment is given to Marriners. Beresford who gave the Rule in the caſe: The King wills that the Peace be kept as well upon the Sea as upon the Land: And we find that you come by due Proceſs, and we ſee nothing why you ought not to anſwer, upon which Book I obſerve five things. Admiralty.

1. That of things done upon the Sea, certain judgment is given to Marriners, id eſt, to Admirals, as ſhall appear, and that doth not belong to the Court of the King, for this, that no Pais may be taken there: And for this, that of a thing in any Town or place, where the Pais or Jury may come, there the Admiral hath not Juriſdiction.

2. This proves directly, that then the Admiral hath Juriſdiction to adjudge things done upon the Sea, from whence no Pais may come; And this did not begin then: But without queſtion, ſo long as there hath been Trade and Traffick (which is the Life of every Iſland) there was Marine Juriſdiction to redreſs Depredations, Piracies, Murthers, and other Offences upon the Sea: And to determine all Contracts made there; and this doth appear by the ſaid Bereſford chief Juſtice (who ſpeaks in the voice of all the Court) where he ſays, that the King willeth that the peace be as well kept upon the Sea as upon the Land; and it is not poſſible that Peace ſhould be kept without juriſdiction of Juſtice.

3. The third thing to be obſerved is, that if part of the matter be done upon the Sea, and part in a County, that the Common Law ſhall have all the juriſdiction.

4. The Sea within the juriſdiction of the Admiral, is deſcribed to be out of every County, for if the Sea be within any County, then pais may come from thence, and the Admiral hath Juriſdiction where the Common Law cannot give remedy.

5. If a thing be done upon the Sea, Hors del County, the party may plead it to

to the jurisdiction of the Court: And all these points are directly without any strain collected out of the said Book.

And it is to wit, that in ancient time the jurisdiction of the Admiral was called Maritima Angliæ, and sometimes Marina Angliæ, and so the Vocabulum artis was made of an Adjective, as the office of Chamberlainship of England was granted to the Earl of Oxford of ancient time, per nomen Camerariæ Angliæ, so that Maritima Angliæ, since Marina Angliæ, signifies the Admiralship or Marinship of England: for Marinus, idem est quod θαλάσιος, that is, of the Sea, and θαλασσιάρχος, is the Admiral or general of the Fleet, and Almarath, by corruption Admiral, signifies the Governor or Captain of the Navy; and so Archigubernus signifies the Admiral or chief Governor of the Captains of the Navy, chief Captain of Mariners, Admiral of the Fleet, Admiral of the Ships, &c. sunt synonyma: And in ancient time, sometimes one was Admiral of all England, and sometimes the Office was divided; And for this Ex Rotulo Patentium de An. 6 H. 3. de Maritima Custodienda, the Letters Patents are, Dominus Rex commisit Galfrido de Lacy Maritimam Angliæ custodiendam, quamdiu Dominus Rex placuerit, with commandment of that attendance, Ad fidem, commodum, & honorem Domini Regis. Teste apud Lond. 29 Augusti.

Ex Rotulo Patentium Anno 9 H. 3. Rex omnibus de Costera maris Norf. & Suff. salutem. Sciatis quod concessimus Richardo Agnillo Marinam Guardiam Norf. & Suff. cum omnibus pertinentiis, scil. Erewe, Oreford, Dunmervie, Gerem. & Lenn custodiendam quamdiu nobis placuerit, & ideo vobis mandamus, quod ei in omnibus, quæ ad dictam Marinam pertinent, intendentes sitis & respondentes. Teste, &c. apud West. 3. Octob. And Geffry Lacy was called Admiral of England.

Charta 15 H. 3. 28. Junii, Petrus de Rivall habet ad totam vitam suam Custodiam omnium Portuum & totius Costeræ Marinæ Angliæ cum omnibus libertatibus & liberis consuetudinibus prædict. Portuum & Costeræ Maris pertinentibus, &c. 2. pars. Patent. 25 Ed. in 14 Claus. in Dorso in 18 William Leybourne Capitaneus Marinariorum.

At this time there were two Admirals; the one had the Government of all the Fleet from the mouth of Thames versus Boream, the other from the mouth of Thames versus Occidentem 1 pars, Patent. 25 Ed. 1. 25. Martii in 9. Johannes Botetort Custos Regis portuum Maritimorum versus partes boreales, 1. pars, Patentium. 10 Ed. 2. 8 Dec. Nicolaus Kirril constituitur Admirallus del Fleet, scil. omnium Navium ab ore aquæ Thamesis versus partes occidentales. 18. Aug. Et ibid. Tho. de Drayton Admirallus ab ore aquæ Thamesis versus partes Boreales.

And so in the time of R. 2 H. 4 H. 5 H 6. during whose Reign there was likewise unus, qui fuit Admirallus Angliæ.

8 Ed. 2. Coron. 399. Where a man may see that which was done of one part, and the other of the water, &c. in that place the County may have Cognizance, and it may be tried by a Jury: which proves also, that that which may be tried by the Common Law, doth not belong to the Admirals Jurisdiction: And Stamfords Pleas of the Crown, lib. 1. fol. 51. citing this Book, says thus, viz. So this proves that by the Common Law before the Statute, &c. the Admiral shall not have Jurisdiction, unless upon the high Sea, which proves that the Admiral by the Common Law hath Jurisdiction upon the high Sea, Ex quo sequitur, that, his Jurisdiction was by the Common Law, and then it is so ancient, that the Commencement cannot be known; so that I do conclude, that his authority did not begin in the Reign of Ed. 3. as Monsieur Lambert, upon uncertain conjectures supposeth: For if the Jurisdiction had then began and been instituted, it would have appeared upon Record.

Pasch.

Paſch. 9. Jac. Regis.

IT was reſolved by the two chief Juſtices, the chief Baron, the Attorney and Sollicitor, that the King may erect any name of Dignity, which was out before, and for that reaſon the King may create a Dignity, by name of Baronet, and create one to be a Baronet, to him and his Heirs Males of his body iſſuing.

It was reſolved, that if he do not create him of ſome place, he ſhall not have an Eſtate tail, but Fæ-ſimple conditional, which ſhall be forfeited for Felony; but if he create him Baronet of a place, then he ſhall have an Eſtate-tail, within the Statute of Weſt. 2. and the King may grant to him and the Heirs Males of his body, precedency before Knights Baronets, Knights of the Bath, and Knights Bachelors, and alſo may grant precedency to their Wives, Sons, and Daughters, &c. And that he cannot create any Dignity above the Dignity of a Baronet & under the dignity of a Baron: And that the creation of this dignity of a Baronet, ſhall not diſcharge the Heir to be in Guard, as if the Heir be made a Knight, for he is not made Knight by this, for the Dignity of a Knight is not deſcendable.

Paſch. 9. Jac. Regis.

NOte; that in treſpas and Treaſon, the higheſt and the loweſt offence, there are not any acceſſories, but all are principal: But in caſe of Felony, above the ſum of 12 d. there and in caſe of death, &c. there may be acceſſories, alwell before as after; in caſe of petit Larceny there cannot be any acceſſory for the ſmalneſs of the felony; Then the caſe is, That A. counterfeits the great Seal of England, and B. knowing that he did counterfeit it, receives him, and abets and conforts him: If B. in this caſe was guilty of the Treaſon, is the queſtion. And it ſeems he is not, for although that A. by the counterfeiting be a Traytor, the accepting and comforting of him cannot make him an acceſſory, for that in caſe of high Treaſon there can be no acceſſory, and a principal he cannot be, for this, that at the time of the counterfeiting he did not know of it; but if one before the Act done, procure one to counterfeit the great Seal, there it is high Treaſon; for in the Law he counterfeits the great Seal: And in the Indictment he may be charged with the Fact, viz. the counterfeiting, but ſo is not he who receives after the Fact, for he cannot be charged with the Fact; And in caſe of Treſpaſs: he who gives conſent and aid to the Treſpas, is a Principal in the Treſpas; And this, as to me it appears, is very apparent in reaſon, and agrees with our Books, as 19 H. 6. 47. b. he who is conſenting and aiding to the making of falſe money, commits high Treaſon, for he is Particeps Criminis before the Fact done, but it is held in Conyers caſe, Mich. 13, & 14 Eliz. Dyer 296. that in the ſame caſe, if one after the act done, know of the making of falſe money, and receive the party, this is not Treaſon but miſpriſion of Treaſon, for not making diſcovery; and with this accords 3 H. 7. 10. that it is not Treaſon: which diverſity Stamfords Pleas of the Crown, fol. 3. hath not well obſerved, vide Dyer 298. vide le Stat. 27. Eliz. which made him who received a Jeſuite a Felon, for by the judgment of the Parliament the receit of a Jeſuite, although he be a

Traitor, is not Treaſon; for the Statute makes the returning of a Jeſuite Treaſon, of which he who receives him cannot be indicted; but it is miſpriſion for any who receives him and doth not diſcover, according to the reſolution in Coyners caſe.

Paſch. 9. Jac. Regis.

Sir William Chancey's *Caſe.*

IN this very Term Sir William Chancey having the priviledge of this Court, and being Priſoner in the Fleet, was brought to the Bar by Habeas Corpus by the Guardian de Fleet, who returned, that the ſaid Sir William was committed to the Fleet by force of a Warrant from the high Commiſſioners in Eccleſiaſticall Cauſes: the Tenor of which Warrant follows in theſe words.

THeſe are to will and require you in his Majeſties Name, by vertue of his high Commiſſion for Cauſes Eccleſiaſticall, under the great Seal of England, to us & others directed, by force of a ſtatute in ſuch caſe provided, that herewithall you take and receive into your Cuſtody the body of Sir William Chancey Knight, whom we will that you keep and detain under Cuſtody, untill further order ſhall be taken for his enlargement, letting you know, that the cauſe of his Commitment is, for that being at the Suit of his Lady convented before his Highneſs Commiſſioners Eccleſiaſtical for Adultery, and for expelling her from his company, and Cohabitation with another woman, without allowing her any competent maintenance, and by his own confeſſion convicted thereof; he was thereupon by order of Court enjoyned to allow his Wife a competent maintenance, according to his abilty, and to perform ſuch Submiſſion and other order for his Adultery, as by Law ſhould be enjoyned him. Which expreſſly he refuſed to do, in contempt of his Majeſties ſaid Authority, to us on that behalf committed: Given at London 19 Martij 1611. ſubſcribed,

London.

Hen. Montague, *Thomas Morton,*
George Overall. *Zachary Paſfield.*

And it was moved by Nicolas Serjeant of Council with Sir William, that this return was inſufficient, for two cauſes. The one for this, that Adultery ought to be puniſhed by the Ordinary, and is not ſuch enormous Offence that it ſhall be puniſhed by the high Commiſſioners, upon which the Offender cannot have his appeal, or other remedy; And clearly the wife ſhall not ſue there for Alimony, Quod fuit conceſſum per Coke, Warberton, and Foſter, but Walmſley doubted of Adultery; for it ſeemed to him that this was an Offence enormous, 2. That by force of the act 1 Eliz the high Commiſſioners cannot impriſon the ſaid Sir William for Adultery, not for denying Alimony to his Wife (if that was within their Juriſdiction.) And although that the words of the Letters Patents gives them power to impriſon the party, yet if the act doth not warrant it, they cannot impriſon him

And Doderigde, Serjeant to the King, of Council on the other side, did not defend the imprisonment to be lawfull; And it was clearly agreed by Coke, Walmsley, Warberton & Foster, that the Commissioners had not power to imprison him in this case: And Walmsley said, that although they have used by twenty years to imprison in such case without exception taken, yet when it came before them judicially, they ought to judge according to Law: And upon this Sir William Chancey was bailed: Also it was reresolved Per totam Curiam, that when upon the return it doth appear, that the imprisonment is not lawful, the Court may discharge him of imprisonment, but in this case the Court thought fit rather to bail him untill the next Term, and in the mean time to attend upon the Arch bishop, and to do that which of right and reason they ought to do. Also it was resolved that the return was insufficient in form.

1. It is not shewn when the Adultery was committed

2. He was enjoyned to allow his wife a competent maintainance without any certainty; And to perform such submission and other order for his Adultery, as by the Law he shall be enjoyned, and it is all in futuro and uncertain what order they will take, and yet for the refusal they imprison him: Also they make their Warrant by force of a Commission to them and others directed, and do not say, or to any four of them, so that it may appear to the Court, that they who made the Warrant had power by the Commission; also it is said in the Warrant, that he was summoned by the order of the Court, Vide in my Treatise at large the reasons and causes for why the Commissioners (unless that it be in special cases) may sue and imprison, Vide Pasch. 42 Eliz. Rot. 1209. Ed. Thickness is imprisoned by the high Commissioners, and upon Habeas Corpus delivered by the Justices of the Common Pleas.

Pasch. 9 Jacobi Regis.

Empringham's Case, Star-chamber.

IN this very Term a case was moved in the Star-Chamber upon a Bill exhibited by the Attorney general against Robert Empringham, Vice Admiral in the County of York, Marmaduke Kettlewel, one of the Marshals of Admiralty, and Thomas Harrison, one of the informers of the Court of Admiralty in the said County; and they were charged with oppression and extortion, that they had fined and imprisoned divers of the Kings Subjects in the County of York, which no Judge of the Admiralty can justifie, for that the Court is not a Court of Record, but the proceedings there are according to the Civil Law, and upon their sentence Appeal and no Writ of Error lyeth: Also the said Empringham hath caused divers to be cited to appear before him for things done in the body of the County; as for not repairing of the banks of a River, which is within the body of a County; Also for cutting of Trees upon his own soyl; and such like, which were determinable by the Common Law, and not before the Admiral, for his authority is limited to the high Sea, and is out of any County; And for these and other Oppressions and Extortions they were by sentence of the Court of Star-Chamber fined, imprisoned, and an award, that Restitution should be made, &c.

Trin. 9. Jacobi Regis.

MEmorandum, that upon Thurſday before the Term of holy Trinity, all the Juſtices of England were by the command of the King aſſembled in the Council-Chamber at Whitehal, where was alſo Abbot, Arch biſhop of Canterbury, and with him two Biſhops and divers Civilians, where the Arch biſhop did complain of Prohibitions to the high Commiſſioners out of the Common Pleas, & the delivery of perſons committed by them by Habeas Corpus. and principally of Sir William Chancey, where I defended our proceedings, according to the Treatiſe which I made of it, and which I delivered before the high Commiſſioners: And after great diſputation betwixt the Arch biſhop and me, at laſt the Arch biſhop ſaid, that he had a point not yet touched upon in my Treatiſe, which would give ſatisfaction to the Lords, and to us alſo without queſtion, upon which he would relie; and that was the clauſe of reſtitution and annexation, ſcil. And that all ſuch Juriſdictions, Priviledges, Superiorities, & Prehemineces Spiritual and Eccleſiaſticall, as by any Spiritual power or authority hath heretofore, or hereafter lawfully may be exerciſed or uſed, for the viſitation of the Eccleſiaſticall State and perſons, and for reformation, order, and correction of the ſame, and of all Errors, Hereſies, Schiſms, &c. ſhall for ever by authority of this preſent Parliament be united and annexed to the imperial Crown of this Realm: And it was ſaid, that the Kings H.8. and Ed.6. gave power by their Commiſſions under the great Seal to divers to impoſe Mulcts, &c. in Spiritual and Eccleſiaſticall cauſes, &c. and upon this he concludes, that inaſmuch as this had been uſed before 1. Eliz. this is given to the Queen Eliz. and her Succeſſors: Alſo inaſmuch as by the Statute of 2 H.4. and 2 H.7. the Juriſdiction Eccleſiaſtical may fine and impriſon in certain particular cauſes Eccleſiaſtical, for this cauſe Juriſdiction to fine and impriſon in all Eccleſiaſticall cauſes is given to the King: And this he ſaid he uttered to the intent that it may be anſwered; To which I for a time gave this anſwer, That it was good for the Weal-publick, that the Judges of the common Law ſhould interpret the Statutes, and Acts of Parliament within this Realm; and that if ſuch interpretation ought to be made, was abſurd & againſt Law and reaſon for divers cauſes.

1. For that if ſuch word (lawfully) were omited, that yet this Act, as appears by the Title and Preamble, being an Act of Reſtitution, ought to be intended of lawfull juriſdictions, priviledges, &c.

2. Theſe words, Heretofore hath, or hereafter lawfully may be exerciſed, &c. This word lawfully extends as well to times paſt, as to times future: And all this was affirmed by all the Juſtices.

3. It was ſaid by me, that before the Statute of 1 Eliz. no Eccleſiaſticall Judge may impoſe a Fine or Impriſon for any Eccleſiaſtical or Spiritual Offence, unleſs there be authority by act of Parliament: And this was ſo affirmed by all the Juſtices, that although in ſome caſes they may fine and impriſon, that by this clauſe in all caſes they may fine and impriſon was ſo manifeſt, that it was not worthy any anſwer: But now I have ſeen the Commiſſion made to Cromwel to be Vice-gerent, and other Commiſſions to others by his appointment, for this, that he was imployed in the affairs of the Kingdom, in which Commiſſion are theſe words, Vide my Book of Preſidents, the Commiſſion at large.

And afterwards in this very Term the privy Council ſent for the Juſtices of the common Pleas onely, and there the reaſons and cauſes of the ſaid reſolution were largely debated, and oppoſition was made as much as might be by Egerton Lord Chancellor, but the Juſtices of common Pleas remained conſtant in their former Opinion; and afterwards the Council ſent for the chief Juſtice of the Kings Bench, Juſtice Williams, Juſtice Cook, Tanfield chief Baron, Snig, Altham, and Bromely, who were not acquainted with the reaſons and cauſes of the ſaid Rule of the common Pleas; nor did they know for what cauſe they came before the Council; and hearing the Lord Chancellor affirm, that the high Commiſſioners have always by Act 1 Eliz. impoſed Fines and Impriſonment for exorbitant Crimes (without any conference with us) were of a ſuddain Opinion with us, without any conference amongſt themſelves, & without hearing of the matter debated: And after at another day this very term, the ſaid Judges of the Kings Bench, Barons of the Exchequer, and Juſtice Fenner and Yelverton, who were omitted before, and We the Juſtices of the common Pleas were commanded to attend the privy Council; And when we all were aſſembled, we of the common Pleas were commanded to retire, for that, as the Lord Treaſurer ſaid, we had conteſted with the King; and in our abſence the King and the Prince ſate with the Council, and then the Juſtices of the Kings Bench and Barons of the Exchequer, were ſeriatim with the Council: And the King demanded their Opinions in certain points concerning the high Commiſſion, with which they were not acquainted before, which were not related to us. In all which as appears, after they were not unanimouſly agreed and after two hours and a halfe, we the Juſtices of the Bench, Coke, Walmſly, Warberton, and Foſter, were commanded to come before the King, the Prince, and the Council, where the King declared, that by the advice of the Council, and by the advice of the Juſtices of the Kings Bench, and Barons, he will reform the high Commiſſion in divers points, and reduce it to certain Spiritual cauſes, the which after he will have to be obeyed in all points: And the Lord Treaſurer ſaid, that the principal Father was pluckt from the high Commiſſioners, and nothing but ſtumps remaining; and that they ſhould not intermeddle with matters of importance, but of petit Crimes; and this word (Errors) being general, ſhall be explained, and no Obligations ſhall be taken of the parties, as before abſurdly and unjuſtly (as he ſaid) had been taken, and divers other things were reformed, as he ſaid, but he did not declare them in particular.

To which it was ſaid by me to the King, that it was grievous to us his Juſtices of the Bench, to be ſo ſevered from our Brethren, the Juſtices and Barons, but more grievous that they differed from us in Opinion, without hearing one another; and eſpecially foraſmuch as we have proceeded in the caſe of Sir William Chancey, and other caſes concerning the power of the high Commiſſioners in impoſing of Fines and Impriſonment judicially in open Court, upon argument at the Bar and the Bench, where it was reſolved by us, that the high Commiſſioners cannot fine & impriſon, but in certain caſes; and the judicial courſe ought to be judicially reverſed; But I ſaid to the King, that when we the Juſtices of Common Pleas ſee the Commiſſion newly reformed, we will, as to that which is of right, ſeek to ſatisfie the Kings expectation; and ſo we departed without any demand of our Opinions.

Trin. 9. Jac. Regis.

Stockdales Caſe in the Court of Wards.

THe King by his Letters Patents, dated 9. April. the ninth year of his Raign, granted, aſſigned and ſet over to William Stockdale, in theſe words.

Such and ſo many of the Debts, Duties, Arrerages, and Sums of Money, being of Record in our Court of Exchequer, Court of Wards and Liveries, Court of the Dutchy of Lancaſter, or within any other Court or Courts within this our Realm of England, or being of Record in any of our ſaid Courts, &c. in any year, or ſeveral years from the laſt year of the Reign of H. 8. untill the thirteenth year of our late Dear Siſter, as ſhall amount to the Sum of a thouſand pound, to have, take, levy, recover, and enjoy the ſaid Debts, Duties, Arrerages, and Sums of Money amounting unto the Sum of a thouſand pound, before in and by theſe preſents given and granted to tha ſaid William Stockdale, his Executors, Adminiſtrators, and Aſſignes.

And in this caſe divers points were reſolved.

1. That the ſaid Grant of the King is void for the uncertainty, for by the Grant no debt in certain may paſs; & if it cannot paſs by the Grant at the beginning, it ſhall never paſs, as this caſe is: As if the King hath a hundred acres of Land in D. and he grants to a man twenty acres of the Land in D. without any deſcribing of them by the Rent, or Occupation, or name, &c. this Grant is void, and in the caſe of the King, the Patentee ſhall not have his election, as he ſhall in the caſe of a common perſon; but in caſe of the King, if the twenty acres are deſcribed, or by abuttals, or by name certain in the particular, this is good demonſtration which twenty acres ſhall paſs.

2. Where the Patentee claims by force of this word Arreragia, to have arrerages of Rents, Reliefs, and mean Rates of Lands, &c. in the Court of Wards, &c.

It was reſolved clearly, that he ſhall not have them, if the Patent had not gone further; for inaſmuch as this word Arraerages is coupled with theſe words, Debts, Duties, and with theſe words ſubſequent (Sums of Mony) it ſhall be intended of arrerages of things perſonal, and not of things real, as of arrerages of accompt of Moneys delivered in Preſt, &c.

But the Proviſo in the end of the Patent, ſcil. Provided allwaies, that the ſaid William Stockdale ſhall take no benefit by any means of arrerages of any Rents, Reliefs, Tenths, or annual Payments whatſoever, untill Sir Patrick Murrey and others be ſatisfied and paid the Sum of 10000 l. &c. hath well explained what arrerages the King intended, viz., of Rents, &c. and ſo to conſtrue one part of the Patent by the other; But clearly mean Rates are not within the ſaid words, for they are the profits of demeaſn. Land.

Trin.

Trin. 9. Jac. Regis.

DIvers men playing at Bowls at great Marlow in the County of Kent, two of them fell out, and Quarrelled the one with the other, and a 3d. man who had not any Quarrel, in revenge of his friend, ſtruck the other with a Bowl, of which blow he dyed; This was held Man-ſlaughter, for this, that it hapned upon a ſuddain motion in revenge of his friend. Man-ſlaughter.

In the very ſame Term a ſpecial Verdict, being divers years paſt found in the County of Hereford, the effect of which: That two Boyes combating together, the one of them was ſcratched in the Face, and his Noſe voided a great quantity of Blood, and he ſo run three quarters of a mile to his Father, who ſeeing his Son ſo abuſed, and the Blood run from him, and his Clothes and Face all Bloudy, he took in his hand a Cudgell, and went three quarters of a mile to the place where the other Boy was, and ſtruck him upon the head, upon which he dyed. And this was held but Man-ſlaughter, for the ire and paſſion of the Father was continued, and there was no time that the Law can determine that it was ſo ſettled, that it ſhall be adjudged in Law, Malice prepenſe; and this caſe was moved ad menſam &c.

Mich. 9. Jac. Regis:

MEmemorandum, that upon Thurſday in this Term, a high Commiſſion in Cauſes Eccleſiaſtical was publiſhed in the great Chamber of the Arch biſhop at Lambeth in which I with the chief Juſtice, chief Baron, Juſtice Williams, Juſtice Crook, Baron Altham, and Baron Bromley, were named Commiſſioners, among all the Lords of the Council, divers Biſhops, Attorney, and Solicitor, and divers Deans and Doctors of the Canon and civil Lawes; and I was commanded to ſit by force of the ſaid Commiſſion, which I refuſed for theſe cauſes. High Commiſſion

1. For this; that I, nor any of my Brethren of the common Pleas were acquainted with the commiſſion, but the Judges of the Kings Bench were.

2. That I did not know what was contained in the new Commiſſion, and no Judge can execute any commiſſion with a good conſcience without knowledg; and that alwayes the gravity of the Judges hath been to know their commiſſion, for Tantum ſibi eſt permiſſum, quantum commiſſum: And if the commiſſion be againſt Law, they ought not to ſit by vertue of it.

3. That there was not any neceſſity that I ſhould ſit, who underſtand nothing of it, ſo long as the other Judges were there, the advice of whom had been had in this new Commiſſion.

4. That I have indeavoured to informe my ſelf of it, and have ſent to the Rolls to have a copy of it, but it was not enrolled.

5. None can ſit by force of any commiſſion, untill he have took the Oath of Supremacy, according to the Statute of 1 Eliz. And for this, if they will read the commiſſion ſo that we may hear it, I have a copy to adviſe upon it, then I will either ſit or ſhew cauſe to the contrary. But the Lord Treaſurer

Treaſurer would for divers reaſons perſwade me to ſit, which I utterly denied.

And to this the chief Juſtice, chief Baron, and ſome others of the Judges ſeemed to incline, upon which the Lord Treaſurer conferred in private with the Arch biſhop Bancroft, who ſaid to him, that he had appointed divers cauſes of Hereſie, Inceſt, & enormous Crimes to be heard upon this day, and for that he would proceed; but at laſt he was content that the Commiſſion ſhould be ſolemnly read, and ſo it was, which contained three great Skins of Parchment, and contained divers points againſt the Laws & Statutes of England: And when this was read, all the Judges rejoyced that they did not ſit by force of it: And then the Lords of the Council, viz. The Arch biſhop, the Lord Treaſurer, the Lord privy Seal, the Lord Admiral, the Lord Chamberlain, the Earl of Shrewsbury, the Earl of Worceſter, with the Biſhops, took the oath of Supremacy and Allegeance, and then we as Commiſſioners were required to take the Oath, which I refuſed untill I had conſidered of it: But as the Subject of the King, I and the other Judges alſo took the Oath of Supremacy and Allegeance.

Then the Lord Arch biſhop made an Oration in commendation of the care and providence of the King for the peace and quiet of the Church: Alſo he commended the Commiſſioners, alſo the neceſſity of the Commiſſion to proceed ſummarily in theſe daies, wherein ſins of deteſtable nature, and Factions, and Schiſms did abound, and proteſted to proceed ſincerely by force of it, and then he cauſed to be called a moſt blaſphemous Heretick, and after him another, who was brought thither by his appointment, to ſhew to the Lords and the Auditory the neceſſity of that Commiſſion.

And after, the Arch biſhop came to the chief Juſtice and to me, and promiſed us, that we ſhould have a Copy of the Commiſſion, & then I ſhould obſerve the diverſity between the old Commiſſion & this; and all the time that the long Commiſſion was in reading, the Oath in taking, and the Oration made, I ſtood and would not ſit, as I was required by the Arch biſhop and the Lords, and ſo by my example did all the reſt of the Juſtices.

And the Arch biſhop ſaid, that the King had commanded him to ſit by vertue of this new Commiſſion, in ſome open place, and at certain daies: And for that cauſe he had appointed the great Chamber at Lambeth in Winter, and the Hall in the Summer; and every Thurſday in the Term time, at two of the Clock in the after-noon, and in the fore-noon, he would have a Sermon for the better informing of the Commiſſioners of their duty, in the true and ſincere execution of their duties.

Mich. 9 Jacobi Regis.

IN this ſame Term the Iſſue in an Information upon the Statute 2 H. 6. 15. was tryed at the Bar, and upon the evidence upon the words of the ſaid Act, which are that every perſon which ſetteth or faſneth in the River of Thames, any Nets or Engines called Trincks, or any manner of Nets, to any Poſts, Boats, Anchors, or the like thing, to ſtand continually day and night, forfeiteth to the King a hundred ſhillings, for every time, &c. and the Defendants having ſet and faſned Nets called Trincks, in the River of Thames, &c. to Boats day and night, for ſo long time as the Tide did ſerve, and not continually.

The

The question was, if this was within the Statute. And it was clearly resolved, that it was within the Statute; for the Nets called Tinckes, cannot stand, but for so long as the Tide serves: And for this, the word Continually shall be taken continually so long as they may stand to take Fish, and as the time of fishing endures, be it in the day or night, for Lex non intendit aliquid impossibile; for otherwise the Law should not be of any effect: And although that it was said, that this Statute remains in force, and if any had complained of any offence against it, he shall be punished, but the reason for why no execution hath been made of this Act, was for this, that none shall have benefit by the Suit but the King only, for the penalty is only given to the King. And as it doth appear by the Preamble, and in the Proviso in the Act, the manner of the Nets was not the cause of the making of the Act, for by the Proviso every man may fish in his seasonable time with Tinckes, if they are of Assize, drawing and conveying them with their hands, as other Fishers do, and not fastning them to Posts, Boats, or Anchors, &c. continually to stand; for the mischief was, by fastning them, and the standing of them continually, the brood and fry of Fish were destroyed, and disturbance made to common passage of Vessels, as Weares, Tides, and other Engines.

Mich. 9. Jacobi Regis:

Shulter's Case in the Star-Chamber.

IN Camera Stell. the Case was such; John Shulter of Wisbich of the age of 115 years had Issue John his eldest Son, and others, viz. Christopher, Richard, &c. and being seised of Lands in Fee of the value of a hundred Marks per annum, his eldest Son being dead, and his Grand-child John being within age, he intended, and so gave direction to make a Lease of a Farm called Rousthall to Christopher during the minority of his Grand-child, rendring the ancient Rent, with power of Revocation: and of Lands in Yatsbury to the said Richard, in the same manner, and for the same time: and Christopher and Richard by the Covin and aid of one Woodroof a Scrivener, 24 Eliz. drew and ingrossed two several Leases of the Premisses severally to Christopher and Richard, for one and fifty years, rendring but four pence per annum, and without any power of Revocation: And John Shulter the Grand-father could read and write very well, but by reason of his great Age was blind; and Woodroof declared to him, that the effect of the said Leases were in all points according to his direction: And upon this the said John Shulter, the Grand-father, sealed and delivered as his Deeds.

And it was resolved by the Lord Ellesmere Chancellor, and by the two chief Justices, that the said Indentures could not bind the said J. Shulter, for this, that he was blind, and like to one who could not read at all; and that the effect being declared unto him in other manner than in truth the Indentures were; It did fully agree with Manfers Case in the second part of my Reports, fol. 4.

Mich. 9. Jac. Regis.

Sir Anthony Aſhley's *Caſe*.

Conſpiracy.

BEtwæn Sir Anthony Aſhly Knight, Plaintiff, and Sir James Creighton, Knight, Hercules Hunnings, John Cantrell Servant of Hunnings, Thomas Hampton, Archibald Sterling, Servants to Sir James Creighton, Henry Smith, Mary Rice, and divers others Defendants, the Caſe was thus:

Sir James Creighton had bought a pretended right of and in the Mannor of Lyddy and Williſent, and divers other Lands of which Sir Anthony had long poſſeſſion; upon which divers motions were made concerning Fines acknowledged to be ſtaid, &c. in the Common Bench, and Sir James Creighton not prevailing in it, and Sir Anthony (for divers miſdemeanors only, heard before the Lords of the Council, at the Council Table, being diſcharged to be one of the Clerks of the Council, and in great diſgrace) he entred into a wicked and damnable Conſpiracy with the other Defendants, to accuſe the ſaid Sir Anthony of ſome hainous and capital Crime, by which he ſhould forfeit all his Land to the value of two thouſand Marks per annum, and his Goods and Chattels to a great value, which they ſhould ſhare amongſt them: And in the end, Henry Smith, who had been the Servant of Sir Anthony, was ſuborned by the ſaid Sir James, and others, to accuſe the ſaid Sir Anthony of the Murther of one William Rice, who was the Husband of the ſaid Mary Rice, one of the Defendants, which William Rice was dead above eighteen years before, upon ſurmiſe made by Sir James Creighton, that after the Attainder of Sir Anthony Aſhley, Smith ſhould have a Portion of five hundred pounds in money; and that Sir James ſhould procure of his Uncle, the Captain of the Guard, a place of the Guard in Ordinary, and procure the King to grant protection to the ſaid Smith againſt his Creditors, and a general pardon of all Offences, but he would not make any accuſation of the ſaid Sir Anthony until he had aſſurance of it; And upon this, Articles by writing Indented were drawn and ingroſſed by one Thomas Wood, a Scrivener, who dwelt in an obſcure place about the Tower, made between Sir James Creighton of the one part, and the ſaid John Cantrell, Servant to Hunnings, by the conſent of Smith, and to his uſe, on the other part, by which Sir James covenanted, That the ſaid John Cantrell and his Heirs, after the conviction and attainder of Sir Anthony Aſhley, ſhall have the ſixth part of his Mannors, Lands, Tenements and Hereditaments, Goods and Chattels in ſix parts to be divided, in conſideration that Cantrell covenanted, &c. that he ſhould procure Witneſſes to convict the Plaintiff of Murther, or other Capital Crime, and to deliver to Sir James Creighton a true particular of all the Lands, Goods and Chattels of Sir Anthony, which Articles were ſealed and delivered by Sir James Creighton, 16. Feb. Ann. 7 Jac. And at the ſame time he was bound to Cantrell in an Obligation of eight thouſand pound for performance of the ſaid Articles, and after, within two days after the ſaid Articles were ſealed and delivered, Henry Smith counterfeited himſelf to be ſick, and then he revealed the ſaid Murther in diſcharge, as he pretended, of his Conſcience, and accuſed himſelf of poyſoning the ſaid William Rice, by the commandment of the ſaid Sir Anthony Aſhley, ſo that he himſelf was the Principal, And upon this Sir James Creighton procured the ſaid Mary Rice, late the Wife of the ſaid William Rice, to preſer a Petition to the King, importing the Accuſation aforeſaid: the King referred the Petition to the chief Juſtice of the Kings Bench, to examine

the

the Cauſe and the Witneſſes on both ſides, the which he did, and certified the King that he had found a falſe Conſpiracy, to indict Sir Anthony without any juſt ground; and certified alſo the effect of the ſaid Articles, upon which the King, after conference with his privy Council, and by their advice thought the matter neceſſary to be heard and ſentenced in the Star-Chamber; the which matter upon ordinary proceedings was heard by ſix days in the very ſame Term: And it was objected by the Councel of the Defendants, that the Bill upon the ſaid Conſpiracy did not lye, and that it ſhould be dangerous to maintain it; for if it ſhould be lawful for every one who is accuſed, or was in fear to be accuſed of any Capital Crime, to exhibit his Bill in this Court againſt the Accuſer and all the Witneſſes, and by many captious and intricate Interrogatories ſeverally to examine them, to find contrariety in them in circumſtances; This will deterr men to proſecute againſt great Offenders, and thence great Offences will paſs unpuniſhed, which will be dangerous to the Weal publick: and by the Law Conſpiracy lies when a man is indicted, and *Legitimo modo acquietus*; but here he was never indicted, and for that it may be, that Sir Anthony is guilty of the ſaid Crime, and then are all mouths ſtopped to ſay the contrary.

But to that it was anſwered and reſolved by the Lord Chancellor, the two chief Juſtices, and all the Court, that in this caſe the Bill was maintainable, although that the party accuſed was not indicted and acquitted before, as it was reſolved in this Court, Hill. 8 Jac. in Poulters caſe, and for the reaſons and cautions there expreſſed; Alſo in this caſe at the Bar, be Sir Anthony guilty or not guilty of the ſaid Murther, yet the Defendants are puniſhable for the great and hainous miſdemeanor and conſpiracy, ſcil. for promiſing of the ſaid Bribes and Rewards to ſuborn the ſaid Henry Smith to accuſe the Plaintiff of the ſaid Murther eighteen years paſſed, and the Articles in writing to ſhare and divide the Eſtate of Sir Anthony after the Attainder; for this corrupt Conſpiracy, and great and perilous practice and miſdemeanor, the Defendants ſhall be puniſhed, let Sir Anthony be guilty or not of the ſaid Crime. And it is a great indignity offered to the King, for any Subject to preſume to covenant or aſſume, that the King ſhall grant protection or pardon, or that the Eſtate of any man ſhall be ſhared and divided, before his Attainder.

So that although that the Court will not enter into the examination of the Crime, yet it appears by the Teſtimony of a great number of Witneſſes, that the ſaid William Rice did not die of any poyſoning, but of another horrible diſeaſe, that he had got by his wicked and diſſolute life, Le grand Pox. which with reverence cannot be ſpoken.

And in this caſe it was reſolved, that if Felony be done, and one hath ſuſpicion upon probable matter that another is guilty of it, becauſe that he had part of the Goods robbed, and is indigent, or of evil fame; or if the party be indicted; or if Murther be committed, and one is ſeen near the place, or coming with a Sword or other Weapon embrued with blood, or that he was in company of Felons, or hath carried the goods ſtollen to obſcure places, or ſuch like things, theſe are good cauſes of ſuſpicion, and by reaſon of this he may arreſt the party ſo ſuſpected, to the end that he may ſubject him to Juſtice.

But in this caſe theſe three things are to be obſerved:

1. That a Felony be done.
2. That he that doth arreſt, hath ſuſpicion upon probable cauſe, which may be pleaded and is traverſable.
3. That he himſelf who hath the ſuſpicion arreſt the party.

For he cannot command another to do it, for ſuſpicion is a thing individual and perſonal, and cannot extend to another perſon than to him who hath it.

Alſo it was reſolved, that if Felony be done, and the common fame and voice is that one hath committed it, this is good cauſe for him who knows of it to arreſt the party, to the intent that he may be brought to Juſtice; but none can arreſt the party ſuſpected by the command of him who hath the ſuſpicion, and with this agrees the Book in 2 H. 7. 15, 16. 15 H. 7. 5. 20 H. 7. 1, 2. 21 H. 7. 28. 7 Ed. 4. 20. 8 Ed. 4. 27. 11 Ed. 4. 4, 6. 17 Ed. 4, 5, 6. 20 Ed. 4. 6. b. 7 H. 4. 25. 27 H. 8. 23. 26 H. 8. 9. 7 Eliz. Dy. 226.

Hill. 9. Jac. Regis.

Breve de Heretico comburendo *lieth not at this day, &c.*

IN this very Term, the Attorney and Sollicitor conſulted with me, if at this day upon conviction of an Heretick before the Ordinary, this Writ De Heretico comburendo lieth; and it ſeems to me clearly that it doth not, for the reaſons and authorities that I have reported, Trin. 9. Jac. fol. 73. And after they conſulted with Fleming chief Juſtice, Tanfield chief Baron, Williams, and Crook; and they upon the report of Dr. Cosins, mentioned in my ſaid Report, and upon certain Preſidents which paſſed in the time of Quæn Elizabeth, upon former Preſidents, although the Statute of 2 H. 4. was enforced, and without conſideration (as I have heard) of the Authorities cited by me in my ſaid Report, they certifie the King, that a Writ de Heretico comburendo lieth upon a conviction before the Ordinary, but that the moſt convenient and ſure way was to convict the Heretick before the high Commiſſioners.

Paſch. 10. Jac.

The Lord Vaux's Caſe.

IN this Term, the Lord Vaux was indicted of a Premunire in the Kings Bench upon the new Statute, for refuſing the Oath of Allegiance, and upon this he was arraigned, and prayed that he might be tried per pares.

But it was reſolved, that he ſhall not in this caſe be tried by his Peers for the Statute of Magna Charta, cap. 29. Nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum, is only to be underſtood of Treaſon, Miſpriſion of Treaſon, Petit Treaſon, and Felony, and of Acceſſories to them, &c. But Premunire is but a Contempt, and Pardon of all Contempts pardons it; and for this cauſe it ſhall not be per pares.

And upon this the Lord Vaux did confeſs the Indictment, vide Lamb. Inſt. del pace 520. Dalliſons Report accordingly: That of Riots, Routs, unlawful Aſſemblies, &c. a Peer of the Realm ſhall not be tried per pares, vide Stamford, &c.

Trin.

Trin. 10. Jac.

Countess of Shrewsbury's Case.

See Horton. 401.

IN this Term, before a select Council at York-House, scil. The Lord Chancellor, the Archbishop, the Duke of Lenox, the Earl of Northampton, Lord privy Seal, the Earl of Suffolk, Lord Chamberlain, the Earl of Worcester, the Earl of Pembroke, Viscount Erskin, Viscount Rochford, the Lord Zouch, the Lord Knolls, the Lord Wooton, the Chancellor of the Exchequer, the Chancellor of the Dutchy, Fleming chief Justice of the Kings Bench, Philips Master of the Rolls, Coke chief Justice of the Common Pleas, and Tanfield chief Baron. Contempt.

The Countess of Shrewsbury (the Wife of Gilbert, Earl of Shrewsbury) then Prisoner in the Tower was brought before the said Lords, and by the Attorney and Sollicitor of the King, was charged with a high and great contempt of dangerous consequence; for they declared that the Lady Arbella being of the Blood-Royal, had married Seymer, second Son of the Earl of Hertford, without privity or assent of the KING, for which contempt the said Seymer was committed to the Tower, and had escaped and fled beyond the Seas; the Lady Arbella being under restraint escaped also, and embarqued her self upon the Sea, and was taken before she got over; of which flight of the said Lady Arbella, the said Countess being her Aunt, very well knew and abetted, as is directly proved by Crompton, and not denied by the Lady Arbella: And admit it, that the Lady Arbella had no evil intent against the King (who had always a great and special care of her, and was very bountiful unto her, until her marriage with the said Seymer, which was the Pomum vetitum) yet when she fled, and when she should be invironed with evil Spirits, Cum perversis perverti possit, and when she shall be in another Sphere, she will move with the same Orb.

And the Lords of the privy Council knowing the Arcana imperii, did shew divers perilous consequences, and the rather for this, that the said Countess is an obstinate Popish Recusant, and, as was said, perverted also the Lady Arbella.

Now the Charge was in two points:

1. That the said Countess of Shrewsbury, by commandment of the King, being called to the Council Table, before the Lords of the Council at Whitehall, and there being required by the Lords to declare her knowledge touching the said points, and to discover what she knew concerning them, for the safety of the King and quiet of the Realm, she answered, that she would not make any particular answer; And being again asked by the Kings command, by the Council at Lambeth, and being charged again to answer to the said points, she refused, for two causes:

1. For that she had made a rash vow, that she would not declare any thing in particular touching the said points; and for that (as she said) it was better to obey God than Man.

2. She stood upon her priviledge of Nobility, scil. To answer only when she was called judicially before her Peers, for that such priviledge was allowed (as she said) to William Earl of Pembroke, and to the Lord Lumley.

2. The

2. The second point of her charge was, that when such answer which she had made was put in writing, and read to her, yet she refused to subscribe to it; which denial to discover and discharge her conscience in a case which toucheth the safety of the King and quiet of the Realm, was urged by the Kings Council to be a great and high contempt; and that Nobility hath not any such priviledge as is alledged, nor any such allowance as was supposed; and that rash and illegal Vows make not an excuse; and that this President being now upon the Stage, was of very dangerous consequence: And the said Countess hearing the charge, yet persisted in her obstinate refusal, for the same reasons and causes upon which she had insisted before: And the Lord Chancellor began, and the Arch-bishop, and all the other Lords began with the first, and adjudged it a great and high contempt; and the Lord Chancellor said, that that was against the Law of England, with which all the Lords agreed.

And that no such allowance was given to the said Earl of Pembroke, or to the Lord Lumley in respect of their priviledge of Nobility, but that they were Voces populi, & ideo non audiendæ: And the Lord Archbishop principally proved, that as well the contempt, as the said rash Vow was against the Law of God, which he and the Earl of Northampton principally proved by divers Texts and Examples in holy Scripture.

And the effect of all that which the three Justices said, was, that after the Sentences of all the learned, prudent, and honourable Personages and Councellors of Estate, they might well be silent; but in regard that Silentium in Senatu est vitium, they would speak something, briefly, viz.

That three things in this case are to be well considered:

1. Whether the refusals aforesaid of the said Countess were Offences in Law against the King, his Crown and Dignity.

2. What manner of proceeding this is, and whether it was justifiable by President or Reason.

3. What is the demerit of the Offences, and how punishable.

As to the first, it was resolved by the Justices and Master of the Rolls, that the denying to be examined was a high and great contempt in Law, against the King, his Crown and Dignity; and that if it should be permitted, it would be an occasion of many high and dangerous Designs against the King and the Realm, which cannot be discovered; and upon hope of Impunity it will be an encouragement to Offenders, as Flemming Justice said, to enterprize dangerous attempts.

And the Master of the Rolls said, that it was not any priviledge of Nobility to refuse to be examined in this case, no more than to any Subject.

Also, if one that is Noble, and a Peer of the Realm, be sued in the Star-Chamber, or in Chancery, they ought to answer upon their Oaths, and may be examined in the Star-Chamber upon Interrogatories upon their Oaths: And if one who is Noble be produced as a Witness between party and party, he ought to be sworn, or otherwise his Testimony is of no value; and so is the common experience in the said Courts: And the chief Justice said, that forasmuch as where Order is neglected, confusion will follow, he would recite some of the honourable Priviledges which the Law of England (more than any other Law) attributes to the Nobility of England in legal proceedings; and they will not be impertinent, but give a great light to the case now in hand.

1. If a Baron, Viscount, Earl, or other Lord of Parliament and Peer of the Realm be Plaintiff in any action, and the Defendant will plead that the Plaintiff is not a Baron, Viscount, Earl, &c. as he is named in the Writ, this shall not be tried at the Common Law by Jury, who may

may be corrupted, nor by Witnesses, as in the Star-chamber or Chancery, who may be suborned; but it shall be tried by the Record in Chancery, which imports by it self solid truth; so great regard hath the Law to the trial of their Honour and Dignity, &c.

2. Their persons have many Honourable Priviledges in Law:

1. At the Suit of a Subject their bodies shall not be arrested; neither Capias nor Exigent lieth against them.

2. For the Honour and Reverence which the Law gives to Nobility, their Bodies are not subject to Torture *in Causa criminis Læsæ Majestatis.* X

3. They are not to be sworn in Assizes, Juries, or other Inquests.

4. If any Servant of the King, named in the Chequer Roll, compass or intend to kill any Lord of Parliament, or other Lord of the Kings Council, this is Felony.

5. In the Common Pleas, a Lord of Parliament shall have Knights returned on his Jury.

6. He shall have day of Grace.

7. A Lord of Parliament shall not be tried in case of Treason, Felony, or Misprision of them, but by those who are Noble and Peers of the Realm. sup: 92

8. In trial of a Peer, the Lords of Parliament shall not swear, but they give their Judgment *Super fidem & ligeantiam Domino Regi debitam*, so that their faith and allegiance stands in equipage with an Oath in the case of a common person in trial of Life: And the Writs of Parliament directed to the Lords of Parliament, are *Sub fide & ligeantia, &c.* And the reason and cause that the King gives them many other Priviledges is for this, because all Honour and Nobility is derived from the King as the true Fountain: And the King honours with Nobility, for two causes.

1. *Ad consulendum*, and for that reason he gives them a Robe.

2. *Ad defendendum Regem & Regnum*, and for that cause he gives them a Sword.

And forasmuch as they derive their Dignities, accompanied with all those Honourable Priviledges from the King, to deny to answer, being required thereto by the King, to such points as concern the safety of the King and quiet of the Realm, is a high contempt and disobedience, accompanied with great ingratitude.

This denial is contra Ligeantiam suam debitam, against the faith and allegiance of a person Noble, due to the King, and which the Law greatly esteems.

And that this denying is against her faith and allegiance, appears by the ancient Oath of Allegiance, which is imprinted in the heart of every Subject, scil. Ero verus & fidelis, & veritatem præstabo Domino Regi de vita & membro & de terreno honore, & vivendum & moriendum contra omnes gentes &c. Et si cognoscam aut audiam de aliquo damno aut malo, quod Domino Regi evenire poterit quod non revelabo, &c. And this Oath of Allegiance is common to all Subjects, as well those of the Nobility as Commonalty: But the Law hath greater account of the Faith and Allegiance of a Noble

X This passage is expressed very unguardedly, & by considering ye not being subject to torture in High Treason is one of ye privileges of nobility, it might with reason be inferred from thence, that other persons, in ye opinion of Lord Foke & ye rest of ye King's Council who advis'd with on ye case, were subject to torture; if Lord Foke himself

Noble man, than of one of the Commons, for this, that the breach of their Allegiance is more dangerous to the King and Estate, for Corruptio optimorum est pessima; and for this reason, the Countess by her allegiance was bound, without being demanded, to reveal to the King what she knows concerning the Premisses, upon which great mischief may happen to the King and the Realm. But being commanded by the King to declare her knowledge, the denying of it doth greatly aggravate the Offence.

Qui contemnit præceptum, contemnit præcipientem.

Command and Obedience are the ligament of Government, and Ligeantia est Legis essentia; for without Allegiance and Obedience the Law cannot proceed.

As to the second point, viz. concerning the manner of his proceeding.

Vide the Earl of *Essex* Case, 42 & 43 *Eliz.* 424.

1. Private, it is not to fine and imprison, or inflict corporal punishment upon the Countess; for fine and imprisonment ought to be assessed in some Court judicially.

2. Positive, the Fine is Ad monendum, or at the most Ad minandum; it is ad instruendum, non ad destruendum.

This selected Council is to express what punishment this Offence justly deserved, if it be judicially proceeded within the Star Chamber; for which reason this manner of proceeding is out of the mercy and grace of the King against this honourable Lady, that she seeing her Offence may submit her self to the King without any punishment in any Court judicially.

If Sentence shall be given in the Star Chamber according to Justice, you the Lords shall be Agents in it; But in this manner according to the mercy of the King, the King is only Agent: the Law hath put Rules and Limits to the Justice of the King, but not unto his mercy; that is, transcendent and without any limits of the Law; Et ideo processus iste est regalis plane & Rege dignus.

mss NC Tit: pardon

Also inasmuch as the allegiance and obedience of the Subject is the best flower in his Imperial Garland, to the intent that it may neither be blasted, nor impaired by this dangerous example, to the prejudice of his Royal Prerogative and Posterity, this Proceeding hath been thought necessary: And this is fortified by the President of the Earl of Essex, against whom such proceedings were in this very place, An. 42 & 43 Eliz. Reg.

And as to the last point it was resolved by all quasi una voce, that if a Sentence should be given in the Star Chamber judicially, she should be fined twenty thousand pound, and imprisoned during the Kings pleasure.

Trin.

FH
MVSEVM
BRITANNICVM

Trin. 10. Jac. Regis.

Robert Scarlet's Case.

NOte, that at Seſſions of Peace held lately at Woodbridge in the County of Suffolk, the Sheriff returned a grand Inqueſt, of which one Robert Scarlet, in the County of Suffolk had requeſted to be one, but the Sheriff, knowing the malice of the man, refuſed to return him; but notwithſtanding by Confederacy with the Clerk who read the Pannel, he was ſworn of the Grand Inqueſt, and was not returned by the Sheriff; and being amongſt them of the Grand Inqueſt, and as one of them, of his malice, and upon his own knowledge, as he pretended (to whom the reſt gave credit) indicted ſeventæn honeſt men, upon divers penal Laws; and ſome of the Juſtices loking over the Bills, found by the Grand Inqueſt, and perceiving ſo many honeſt men to be indicted, as they did think, maliciouſly, demanded of them of the Inqueſt, what evidence they had to find the ſaid Bills, and they anſwered, By the teſtimony and Cognizance of one of themſelves, ſcil. of Robert Scarlet: And upon examination it did appear, that the ſaid Robert Scarlet was not returned, but that he by confederacy betwixt him and the Clerk, procured himſelf to be ſworn of the ſaid Grand Inqueſt, with intent to indict his Neighbours maliciouſly, for which offence he was indicted at Sumner Aſſizes, A. 10 Jac. held at Bury, upon the Statute 11 H.4. cap. 9. by which it is provided that no Indictment ſhall be found by any perſons named to the Juſtices, without due return of the Sheriff, but by inqueſt of lawful Liege people of the King, in ſuch manner as was uſed in the time of his Noble Progenitors, returned by the Sheriff, &c. without any denomination, &c. And if any Indictment be made hereafter in any point contrary, that the Indictment ſhall be void, and for ever held Nul.

And upon this Act of 11 H.4. the ſaid Robert Scarlet was indicted, and he pleaded Not guilty. And all the eſpecial matter aforeſaid was proved in evidence; and upon this he was found guilty by a ſubſtantial Jury: and in this caſe conſideration was had of divers points.

1. Whether the Juſtices of Aſſize have power to puniſh this Offence, or no; and it was held affirmatively, ſcil. by force of their Commiſſion of Oyer and Terminer, for that the ſaid Commiſſion gives them power Ad inquirendum inter alia de omnibus falſitatibus, negligentiis, &c. & aliis malefactis, offenſis & injuriis quibuſcunque, and of them to hear and determine; and this is underſtood as well of offences againſt an Act of Parliament, as againſt the Common Law; And for that that it is commonly uſed, that Indictments of non-reſidency of Parſons, Vicars, &c. upon the Statute of 21 H.8. are taken before the Juſtices of Aſſize, by force of this word in the ſaid Commiſſion of Oyer and Terminer, viz. Negligentiis, &c. ſo that if the Act be indefinite or general, and doth not give Juriſdiction to any certain Courts in ſpecial (for then the Act is to be purſued) the general words of the Commiſſion of Oyer and Terminer extend to it: And it was well obſerved, that in the Commiſſion of the Peace the ſaid general words, ſcil. De omnibus & ſingulis aliis malefactis & offenſis have a qualification, ſcil. de quibus Juſticiarii de pace legitimè inquirere poſſint aut debent, which limitation proves the large extent of the words, when they ſtand without any qualification.

Vide 7 Eliz. Dyer, Commissioners of Oyer and Terminer may enquire of Offences against penal Statutes, unless that the Statute appoints them to be determined in any Court of Record; and the opinion there, that any Courts of Record of the King, are restrained to the four Ordinary Courts of Record at Westminster, is not held for Law; and continual experience hath been always against it, as the Statute 5 Ed. 6. 14. of Forestallers, Ingrossers, Regrators, gives the penalty to be recovered in any Court of Record: And Justices of Assize in respect of their Commission of Oyer and Termines have always enquired of them, the Statute 33 H. 8, 9. of unlawful Games, And the Statute of Woods, 35 H 8. cap 17. and many other Statutes; and so the Quære is well resolved in 7 Eliz. For the opinion of Eallin Saunders, and Whiddon, there it is held at this day for good Law.

2. The second consideration was had upon the Statute of 11 H. 4. cap. 9. and it was held, that the said Robert Scarlet was an Offender within the Statute, for it is to be understood, that the said Statute is partly affirmative of the Coumon Law, and partly a new Law.

In affirmance of the Common Law, in part privative, No Indictment shall be found by any person named to the Justices: and in part positive, But by inquest of lawful people of the King, returned by the Sheriff. And that this was in affirmance of the Common Law, the Statute proves it, in the manner as was used in the time of his Noble Progenitors: And in the Preamble it is said, against the course of Common Law used and accustomed before this time: and that the said Robert Scarlet was an Offender against the said Act, for this, that he knowing that he was not returned of the Grand Inquest, procured himself by false conspiracy to be sworn, as is aforesaid: And although that a person solely was in such undue and unlawful manner sworn of the Grand Inquest, yet this was within the Act; and by consequence an offence against the Common Law, for that malice and falseness alone may be of great mischief, as appears in this case.

3. The third consideration was had of 3 H.8 10. which alters the said Act of the 11 H.4. in part, as to denomination; For by the Act of the 3 H.8. the Justices of the Goal-delivery or Justices of Peace, of whom one to be of the Quorum, in open Court may alter the Pannel returned by the Sheriff to enquire of the King only, by addition or extraction of any Jurors so returned: And they have power to command the Sheriff to put other in the Pannel, according to their discretion: And the Sheriff ought to return the Pannel so reformed upon the penalty of the said Act, so that none can be of any Grand Inquest but by the return of the Sheriff; and for this, the Act of 3 H.8. cap. 10. hath not altered the Law, as to the offence of Robert Scarlet.

4. The said Act 11 H.4. hath made a new Law, scil. That any Indictment found against the Act shall be void, which branch doth not make void any Indictment or Presentment, that in the nature of an Indictment found any point contrary to the said Act, is made void by the said Act, so that this may draw in question all the Indictments found at the same Sessions: And for this Judgment was given that he should be fined and imprisoned.

Trin.

Trin. 10. Jac.

Baker and Hall's Caſe.

NOte, that upon conſideration of the Statute of 3 H.7.cap.14. It was reſolved by Coke chief Juſtice of the Common Pleas, Yelverton, Williams, Snig, and others; That whereas it is provided, that what perſon ſoever who takes a Woman ſo againſt her will, &c. although that the body of the Act extend to taking only, yet in reſpect of this word [ſo] it hath relation to the Preamble (to ſuch perſon as is deſcribed in the Preamble, ſcil. Having ſubſtance) it was agreed by all, that if the Wife hath nothing, nor his Heir apparent, it is out of the Statute, for the Statute would not have been ſo curious in deſcribing the perſon, and all in vain. Star-chamber.

2. This word [So] relates to the quality and event of the taking, mentioned in the Preamble, ſcil. to be married, or defiled, for if ſhe be not married or defiled, it is not ſuch a taking [ſo] id eſt, ſo married, or ſo defiled; and it is not reaſonable that So ſhall have relation to the taking, which is more remote, and not to the marriage or the defiling, which is nearer Quod fuit conceſſum, &c. and Clergy is taken away by the Statute of 38 Eliz. cap.9. for Principals or Procurers before, vide Stamford, fol.37. b. accordingly: And ſo was the Law taken in the 3 & 4 Ph. & Mar. as Juſtice Dalliſon reported, vide Lamb.252. Juſtice of Peace.

Note, the Receivers of the Woman are Principals, but not the Receivers of them who took the Woman, for theſe are but Acceſſories, vide Lamb. ibid.

NOte, that I ſaw a Report in the time of Queen Mary upon the Statute 50 Ed.3.cap.5., & 1 R.2.c.15. concerning the arreſting of them in holy Church, that the ſaid Statutes are but an affirmance of the Common Law, and in maintenance of the liberties of holy Church, as appears by the preamble of the ſame Statutes, and there held, that Eundo, redeundo & morando, for to celebrate Divine Service, the Prieſt ought not to be arreſted, nor any who aid him in it: as the caſe was of one who admitted the Prieſt to ſing Maſs, and that the party grieved may have an action upon the Statute 50 Ed.3. for when any thing is prohibited by an Act, although that the Act doth not give an action, yet action lieth upon it; as upon the Statute of Marlb. which prohibits to take in the high way, or Articuli ſuper Chartas 3. which prohibits the Court of Marſhalſey to hold Plea, &c. although that theſe Acts do not give action, yet an action lieth. 7 A.6.30, &c. and the Statute 2 H.5. which commands a Libel to be delivered, 4 Ed.4.37. vide Regiſtrum in Bre.6.ſuper Stat. Priviledge of Prieſts.

Crown.

NOte, if a man be convicted, or hath judgment of death for a Felony, he shall never answer by the Common Law to any Felony done before the Attainder, so long as the Attainder remains in force, vide 8 Eliz. cap. 4. 18 Eliz. 7. And at this day, if a man be adjudged to be hanged, and hath his pardon, he shall never answer to any Felony before, for he cannot have two Judgments to be hanged. Aliter, if the first Attainder be reversed by Error: So if a man be Outlawed, and by that Attaint of Felony he cannot be arraigned of any Felony before, for he cannot be twice attaint, vide 10 H. 4. Coron. 227. case del Appeal, &c.

A Man seized of a Mannor to which he hath Stray appendent by prescription, &c. by his Baily he seizeth an Ox as a Stray within the Mannor, and makes Proclamations according to Law; and within the year and day lets the Mannor with all Royalties, Liberties, and after the year and day passed: and Dyer Serjeant did move the Court, who should have the Estray; And Brown Justice was of Opinion, that the Lessor should have it, forasmuch as he had the possession; and when the year and day are passed, the Property shall have relation to the time of the first seisure: But all the Justices were against him, and that the Lessee shall have it, forasmuch as the property of the Stray is not altered or changed before the year and day: And the Lord of the Mannor, until the year and day are past, hath but the Custody, so that the Owner may re-have it always within the year and day, if he will pay for the meat of it: Nor can the Ox be laboured or used by the Lord before the year and day, and therefore he shall be paid for the meat, unless it be such a Beast as of necessity ought to be used, as a Milch Cow, &c. And it was held, that if one take a Stray within a year and a day, if it stray out of the Mannor, the Lord may re-take it before seisure,

Simony, Stat. 31 Eliz.

Jup. 73.

IN the case of Doctor Hutchinson, Parson of Kenn, in the County of Devon, It was resolved per totam Curiam, that if any shall receive or take Money, Fee, Reward or other profit, for any presentation to a Benefice with Cure, although in truth he which is presented be not knowing of it, yet the presentation, admission, and induction are void per expressa verba Statuti of 31 H. 8. cap. 6. And the King shall have the presentation hac vice, for the Statute intends to inflict punishment upon the Patron, as upon the Author of this Corruption, by the loss of his presentation, and upon the Incumbent, who came in by such a corrupt Patron, by the loss of his Incumbency, although that he never knew of it; but if the Presentee be not cognizant of the Corruption, then he shall not be within the clause of disability in the same Statute: And so it was resolved by all the Justices in Fleetstreet, Mich. 8 Jac. fol. 7. vide Statuti, which are very well penned against the avarice of corrupt Patrons.

Hugh

Hugh Manney's Case.

IN an Information in the Exchequer against Hugh Manney Esq; the Father, and Hugh Manney the Son, for intrusion and cutting off a great number of Trees in the County of Merioneth, the Defendants plead, Not guilty: And Rowland ap Eliza Esquire, was produced as a Witness for the King, and deposed upon his Oath to the Jurors, that Hugh the Father and the Son joyned in sale of the said Trees, and commanded the Vendees to cut them down, upon which the Jurors found for the King with great dammages; And judgment upon this was given, and execution had of a great part. Perjury.

And Hugh Manney the Father exhibited a Bill in the Star-chamber at the Common Law, against Rowland ap Eliza, and did assign the Perjury in this, that the said Hugh the Father did never joyn in sale, nor command the Vendees to cut the Trees; and the said Rowland ap Eliza was by all the Lords in the Star-chamber convict of corrupt and wilful Perjury: And it was resolved by all, that it was by the Common Law punishable before any Statute: And although that the Witness depose for the King, yet he shall the rather be punished than for another, for the King is the Head and Fountain of Justice and Right; and he who perjures himself for the King, doth more offend than if it were in the case of a Subject.

Haye's Case, in Curia Wardorum.

BY Inquisition in the County of Middlesex, An. 6 Jac. by vertue of a diem clausit extremum, after the death of Humphrey Wilward, it was found that the said Humphrey died seized of a Messuage and twenty six acres of Land in Stepney; and that John Wilward was his Heir, and of the age of fourteen years and nine days; and that the Land was held of the King in Capite, by Knights-service, John Wilward died within age, and by Inquisition in Mid. 8. Junii An. Jac. by vertue of a Writ of Devenerunt, after the death of the said John Wilward, it was found that the said John died seized in Ward to the King, and that the said Messuages and Lands at the time of the death of the said John, were holden of the Dean of Pauls, as of his Mannor of Shadwell.

All the mean Rates incurred in the life of John Wilward, are paid to the King.

The Questions are,

1. Whether by the Death of the said *John*, and finding of the mean Tenure in the *Devenerunt*, the first Office granted to Points be determined?
2. Whether the Tenure found by the first Office may be traversed?

And

And as to theſe Queſtions, it was reſolved by the two chief Juſtices and chief Baron, that where the ſaid John died, the Office found by force of the ſaid Writ of Diem clauſit extremum, after the death of Humphrey Wilward, whereby the King was entituled to the Guardianſhip of the ſaid John, hath taken its effect and is executed, and does remain as evidence for the King after the death of the ſaid John, but nevertheleſs is not traverſable, for it is traverſable during the time it remains in force only, and the Jurors upon the Devenerunt after the death of the ſaid John, are at liberty to find the certainty of the Tenure, and they are not concluded by the firſt Inquiſition, for they are ſworn Ad veritatem dicendum, and with this agrees, 1 H. 4. 68. And all this appears by the diverſity between the Writ of Diem clauſit extremum, and the Writ of Devenerunt: And it is to be obſerved, that there is no difference between the Writ of Diem clauſit extremum, and the Writ of Devenerunt, but in one point; to wit, the Diem clauſit extremum is general. Viz. Quantum terrarum & tenementorum idem H. tenuit de nobis in capite, &c. die quo obiit, & quantum de aliis generally; and the Devenerunt recites, quod J. filius & Hæres H. qui de nobis tenuit in Capite, nuper dum fuit infra ætatem, & in cuſtodia noſtra fuit, Diem clauſit extremum, ut accipimus: tibi præcipimus, quod per Sacramentum 12. inquiras, quæ terræ & tenementa per mortem prædicti H. & ratione minoris ætatis prædicti J. ad manus noſtras devenerunt, &c. So that this Writ is not general, but does reſtrain only the Lands and Tenements, Quod devenerunt, &c. and all the other points of the ſaid Writ do relate to the Lands and Tenements, Quæ devenerunt, &c. by which it appears, that the firſt Inquiſition is not ſo concluſive, but that by the expreſs Rules of the Writ, the Jurors are at large to find the truth of the Tenure, notwithſtanding the firſt Office. And ſo it was reſolved and decreed accordingly, nono Jacobi, in the Court of Wards in the caſe of Dune Lewes.

Award of *Capias utlegatum* by Juſtices of the Peace.

In the ſame Term the opinion of all the Court of Common Pleas was, that if one be Outlawed before the Juſtices of Aſſize, or Juſtices of Peace, upon an Indictment of Felony, that they may award a Capias utlegatum, and ſo was the Opinion of Periam chief Baron, and all the Court of the Exchequer as to the Juſtices of Peace, for they that have power to award proceſs of Out-lawry, have alſo power to award a Capias utlegatum, as incident to their Authority and Juriſdiction: See the Statute of the 34 H. 8. cap. 14. for certificate of a ſhort Tranſcript of every Attainder, Conviction, or Out-lawry of Felony, by the Clerks of the Aſſizes, Clerks of the Peace, &c. into the Kings Bench, on penalty of forty ſhillings, &c. And note well, that ſuch Tranſcript is by the ſaid Act made to be of as great force as the Record it ſelf: See Lambert in his Juſtice of Peace, fol. 563. contra, but ſee 1 Ed. 6. cap. 1. Juſtices of Peace in caſe of profanation of the Sacrament ſhall award a Capias utlegatum throughout all England.

Her-

Herſey's Caſe, Star-Chamber.

JOhn Herſey Gent, exhibited his Bill in the Star-chamber againſt Anthony Barker Knight, Thomas Barker Councellor of Law, Robert Wright Doctor of Divinity, Ravenſcroft Clerk, and John Haynes; and did thereby charge the Defendants with the forging of the Will of one Margery Pain, and the cauſe came to hearing, Ad requiſitionem Defendentium, and upon hearing of the Plaintiffs Councel, there appeared no purpoſe or preſumption againſt the Defendants, or any of them, but that the Teſtament was duly proved in the Eccleſiaſtical Court, and upon an Appeal was alſo affirmed before Commiſſioners Delegates, and had alſo been decreed in the Chancery; ſo that it appeared to the Court, that the ſaid Bill was preferred of meer malice and ſpite, to ſlander the Defendants, without any colour, and becauſe the Defendants had no remedy at the Common Law for the ſaid ſlander, and if ſuch ſlander ſhould paſs unpuniſht, it may encourage malicious men to make this Court as a Palquil, to fix therein a Libel of Record to charge thoſe that are innocent with hainous Crimes, to remain to all perpetuity.

In this cauſe it was reſolved by the Court, that by the courſe of the Court, and according to former Preſidents, the Court may give dammages to the Defendants, and ſo was it done, viz. two hundred pound to the Doctor of Divinity, two hundred marks to the Knight, forty pound to the Clerk, a hundred and twenty pound to the Woman, and it was ſaid, that Creare ex nihilo, quando eſt bonum, eſt divinum; ſed creare aliquid ex nihilo, quando eſt malum, eſt diabolicum; & plus Maledicere nocet, quam Benedicere docet.

Hill. 2. Jac.

THeodore Thomlinſon had brought an Action of Account for Goods againſt one Philips in the Common Pleas, and thereupon Philips ſued Thomlinſon in the Court of the Admiralty, ſuppoſing the Goods to have been received in forreign parts beyond the Seas: and the ſaid Thomlinſon being committed for refuſing to anſwer upon his Oath to ſome Interrogatories there propoſed to him, brought his Habeas Corpus, which was returned thus, Ego William Pope Mareſcallus ſupremæ Curiæ Admiralitatis Angliæ Dom. Juſtic. Sereniſſ. Reginæ noſtræ in brevi huic Schedulæ annex. ſpecificat. Certific. quod infra vocat. Theodore Thomlinſon ante advent. iſtius brevis capt. fuit & cuſtodiæ meæ commiſſ. ex eo quod dictus Theodorus Thomlinſon vinculo ſacramenti coram Judice Admiralitatis Angliæ aſtrictus ad reſpondend. quibuſdam Articulis contra eum in dicta Cur. dat. &c. ſub pœna quinque librarum, &c. contumaciter examen ſuum ſubire recuſavit, Idcirco, &c. And it was reſolved by the Court of Common Pleas;

1. That the Court of Admiralty hath no Cognizance of things done beyond Sea, and this appears plainly by the Statute of 13 Rich. 2. cap. 5. the words of which Statute are, that the Admirals and their Deputies ſhall not meddle from henceforth of any thing done within the Realm, but only of a thing done upon the Sea, vide 19 H. 6. fol. 7. For things tranſitory done beyond the Seas, are either triable in the Kings Courts, or the party

party grieved may have his remedy before the Justices where the Fact was done beyond Seas.

2. That the proceedings in the Court of the Admiralty are according to the course of the Civil Law, and therefore the Court is not of Record, and by consequence cannot assess any fine in such case, as Judges of a Court of Record may do.

3. That the return above-mentioned was insufficient, as being too general, because it is not specified for what cause or matter Thomlinson was examined, so as it might appear that the Interrogatories were of such things, as were within their Jurisdiction, and that the party ought by Law to answer upon his Oath, for otherwise he might very well refuse.

This Case was intended to have been inserted by my Lord Coke *into his seventh Report, but not then published, because the King commanded that it should not be printed, but the Judges resolved* ut supra.

Right to Seats in the Church.
Corven's Case.

Hob. 69. 2 Bro. 366, & 605. Godbolt. 199.

CORven did Libel against Pym, an Attorney of this Court, for a Seat in a Church in the County of Devon: And Pym by Serjeant Hutton, moved the Court to have a Prohibition upon this reason, that himself is seized of a house in the said Parish, and that he, and all those whose Estate he hath in the house, have had a Seat in an Isle of the Church: And it was resolved by the Court, that if a Lord of a Manor, or other person, who hath a house and Land in the Parish, time out of mind, and had a Seat in an Isle of the same Church, so that the Isle is sole and proper to his Family, and they have maintained it at their own charges, that if the Bishop would dispossess him, he shall have a Prohibition, for it shall be intended that the party's Ancestors, or those whose Estate he hath, have erected and built the Isle with the assent of the Parson, Patron, and Ordinary, to the intent to have it only to himself. But for a Seat in the body of the Church, if a question ariseth concerning it, it is to be decided by the Ordinary, because the Freehold is to the Parson, and the place is dedicated and consecrated to the Service of God, and is common to all the Inhabitants; And therefore it belongs to the Bishop to order it in such manner as the Service of God may be best celebrated, and that there be no contention in the Church. And it is to be presumed, that the Ordinary, who hath the cure of Souls, will take order in such cases, according to right and convenience; that is to say, to take care that Gentlemen may have places fit for them, and the poor people fit places for them also; And the ordering thereof is a matter meerly Spiritual; and with this agrees 8 H. 7. 12. and the chief Justice cited the case of Dame Wiche in 9 H. 4. 14. and said, the case there was, that the Lady brought a Bill in the Kings Bench against a Parson, Quare unam Tunicam vocatam a Coat-armor & Pennons with the Arms of the said Sir Hugh Wiche her Husband, and a Sword in a Chappel where he was buried.

And the Parson claimed them as Oblations, and therefore that they did belong to him; And there it is holden, that if one use to sit in the Chancel, and hath there a place, his Carpet, Livery, and Cushion, the Parson cannot claim them as Oblations, neither ought he to have the said things, for that they were hanged there in honour of the deceased; and therefore,

therefore, by the same reason, although a grave-stone, coat of armor, tomb, &c. are annexed to the Free-hold of the Parson, yet in regard the Church is free to all the inhabitants for burying, the Parson cannot take them.

And the chief Justice said, that the Lady might have a good action during her life, in the case aforesaid, because she her self caused the said things to be set up there, and after her death, the Heir to be deceased shall also have his Action, because that (as the Book saies) they were hanged there for the honour of his Ancestor, and therefore they are in nature of Heirlomes, which by the common Law belong to the Heir, as being the Principal of the Family: The like Law of a Grave-stone, Tomb, and the like,

And this agrees with the Laws of other Nations, Bartho. Cassaneus, fol. 13. Concl. 29. Action dat. si aliquis arma, in aliquo loco posita, deleat sive abrasit, &c. & in 21 Ed. 3. 48. in the Bishop of Carlile's case, it appeared, that the Ornaments of the Chappel of a preceding Bishop, do belong to the succeeding Bishop, and are meerly in succession, although that other Chattels, in case of a sole Corporation, do belong to the Executors of the deceased party, and shall not go in succession, : so in the other case, things erected in the Church for the honour of the dead person, shall go to his Heirs, as Heirlomes, as in manner of an Inheritance.

Note, that in Easter Term, 10 Jacobi, It was resolved in the Court of Star-chamber, in the case between Hussey and Katherine Leyton, and others, that if a man have a House in any Parish, and time out of mind he and all those whose Estate he hath, have used to have a certain Pew in the Church, that if the Ordinary will displace him, he shall have a Prohibition; for if he hath it by prescription, he has as good right in the Seat, as he hath in his house; but observe that he must claim it as belonging to his house, and not in other manner, for properly it belongs to the Inhabitants in the Manor House, if any Manor be, and not to the Manor which includes other Tenants, Farmers, and Inhabitants: But true it is, that the Ordinary shall dispose of common and vulgar Seats in the Church, where there is no such prescription, as is aforesaid.

Earl of Shrewsburie's *Case*.

By force of certain Letters (bearing date 28 Martij. 1612.) of the Lords of the privy Council, directed to Sir Humphrey Winch, Sir James Ley, Sir Anthony Saintleger, and Sir James Hulleston; they did certifie to their Lordships the Claim of Gilbert, Earl of Shrewsbury, to the dignities of the Earldom of Waterford; and Barony of Dungarvan in Ireland, in such manner as follows. Ireland.

King Henry the sixth, by his Letters Patents, in the twentieth year of his Reign, did grant to his thrice beloved Cosin, John Earl of Shrewsbury, in consideration of his approved and loyal Services, in the City and County of Waterford, pro eo quoque quod eundem consanguineum nostrum prædicta terra nostra Hiberniæ in partibus illis contra inimicorum & Rebellium nostrorum insultus potentius defendat, ipsum in Comitem Waterford, una cum stilo & titulo ac nomine & honore eidem debitis ordinamus & creamus habendum to the said Earl and his Heirs Males of his body: and further by the said Letters Patents, did grant the Castles, Lord-ships, Honours, Lands, and Mannors of Dungarvan to the said Earl and the Heirs Males of his body,

to hold the Premiſſes of the King and his Heirs, by Homage and Fealty, and by the Service of being his Majeſties Seneſchal in the Realm of Ireland; Afterwards in the Parliament called Des abſentees, holden at Dublin in Ireland the tenth of May, the twenty eight of Henry the eighth by reaſon of the long abſence of George Earl of Shrewsbury out of the ſaid Realm; It was enacted, that the King his Heirs and Aſſignes, ſhall have and enjoy in right of his Crown of England all Honours, Manors, Caſtles Lord ſhips, Franchiſes, Hundreds, Liberties, Count Palatines, Juriſdictions, Annuities, Fees of Knights, Lands, Tenements, &c. and all and ſingular Poſſeſſions, Hereditaments, and all other Profits as well Spiritual as Temporal whatſoever, which the ſaid George Earl of Shrewsbury and Waterford, or any other perſon or perſons had to his uſe, &c. King Henry the eighth, by his Letters Patents, the twenty ninth of his Reign, reciting the ſaid Statute De abſentees, Nos præmiſſa conſiderantes, & nolentes ſtatum, honorem, & dignitatem prædicti comitis diminuere, ſed amplius augere, de certa ſcientia & mero motu, &c. did grant to the ſaid Earl and his Heirs, the Abby of Rufford, with the Lands thereto belonging in the County of Nottingham, and the Lord ſhip of Rotheram in the County of York, the Abbies of Cheſterfield, Shirbrook, and Gloſſadel in the County of Derby, with divers other Lands and Tenements of great value, to be holden in Capite: And the queſtions were.

1. Whether by the long abſence of the Earl of Shrewsbury out of Ireland, by reaſon whereof the King and his Subjects wanted their defence and aſſiſtance there; the Title of the Honour be loſt or forfeited, the ſaid Earl being Peer of both Realms, and reſiding here in England.

2. Whether by the ſaid Act De abſentees, An. 28 H. 8. the title of the Dignity of the Earl of Waterford, be taken from the ſaid Earl, as well as the Manors, Lands, Tenements, & other Hereditaments in the ſaid Act ſpecified.

And afterwards by others Letters Patents of the Lords of the Council, dated the twenty ſeventh of September 1612. the two chief Juſtices and the chief Baron were required to conſider of the caſe, which was incloſed within their Letters, and were to certifie their opinions of the ſame.

Which caſe was argued by Council learned in the Law, in behalf of the ſaid Earl, before the ſaid chief Juſtices and chief Baron, upon which they having taken great conſideration and adviſement, after they had read the Preamble, and all the ſaid Act of the 28 of H. 8. It was unanimouſly reſolved by them all, as followeth.

As to the firſt it was reſolved, that forasmuch as it does not appear what defence was requiſite, & that the conſideration Executory was not found by Office to be broken as to that point, the ſaid Earl of Shrewsbury notwithſtanding does remain Earl of Waterford.

As to the ſecond, it was reſolved, that the ſaid Act of the twenty eighth of H. 8. De Abſentees, doth not only take away the poſſeſſions which were given to him at the time of his creation, but alſo the dignity it ſelf, for although one may have a dignity without any Poſſeſſions Ad ſuſtinendum nomen & onus, yet it is very inconvenient that dignity ſhould be clothed with Poverty: And in caſes of Writs, and ſuch other legal proceedings, he is accounted in Law a Noble man, and ſo ought to be called, in reſpect of his Dignity; but yet if he want Poſſeſſions to maintain his Eſtate, he cannot prels the King in Juſtice to grant him a Writ to call him to the Parliament; and ſo was it reſolved in the caſe of the Lord Ogle, in the Raign of Ed. the ſixth, as the Baron of Burleigh, Lord Treaſurer of England, at the Parliament An. 35 Eliz. did report: And therefore the Act of the 28 H. 8. (as all other Acts ought to be) ſhall be expounded to take away all inconvenience, and therefore by the general words of the Act, Viz.

Nota 5 inf 107

of

of Honours and Hereditaments, the Dignity it ſelf, with the Lands given for maintenance of it, are given to the King, & the Dignity is extinct in the Crown: And the cauſe of degradation of George Nevil Duke of Bedford is worthy the obſervation, which was done by force of an Act of Parliament. 16 June 17 Ed. 4. which Act reciting the making of the ſaid George Duke, doth expreſs the cauſe of his degradation in theſe words: And forasmuch as it is openly known, that the ſaid George hath not, or by Inheritance may have any livelyhood to ſupport the ſaid Name, Eſtate, and Dignity, or any name of Eſtate: And often times it is ſeen, that when any Lord is called to high Eſtate, and hath not convenient livelyhood to ſupport the ſame Dignity, it inducеth great poverty and indigence, and cauſeth oftentimes great Extortion, Imbracery, and Maintenance to be had, to the great trouble of all ſuch Countries where ſuch Eſtate ſhall happen to be: Wherefore the King by advice of his Lords Spiritual and Temporal, & by the Commons in this preſent Parliament aſſembled, and by the authority of the ſame, ordaineth, eſtabliſheth, and enacteth, that from henceforth the ſame Creation and making of the ſaid Duke, and all the names of Dignity given to the ſaid George, or to John Nevil, his Father, be from henceforth void and of none effect. &c. In which Act, theſe things are to be obſerved. Honour taken away for poverty.

1. That although the Duke had not any Poſſeſſions to ſupport his Dignity, yet his Dignity cannot be taken from him without an Act of Parliament. *ſup 106*

2. The Inconveniences do appear, where a great State and Dignity is, and no livelyhood to maintain it.

3. It is good reaſon to take away ſuch Dignity by Act of Parliament, and therefore the ſaid Act of the 28 H.8. ſhall be expounded according to the general words of the Writ, to take away ſuch inconvenience: And although the ſaid Earl of Shrewsbury be not only of great Honour and Vertue, but alſo of great poſſeſſions in England, yet it was not the intention of the Act to continue him Earl in Ireland, when as his Poſſeſſions in Ireland were taken away from him, but that the King at his pleaſure might confer as well the Dignity as the Poſſeſſions to any other, for the defence of the ſaid Realm. And the ſaid Letters Patents de Anno 29 H.8. hath no words to reſtore the Dignity, which the Act of Parliament hath taken away; but it was not the intent of the King *Diminuere ſtatum, honorem, & dignitatem ipſius Comitis*, but *Augere* his Poſſeſſions for maintenance of his Dignity, for ſo much appears by this word *Augere*; for he doth by the ſaid Letters Patents, with exceeding great bounty, increaſe the Revenues of the ſaid Earl in England, which the King did think was an encreaſe of large Poſſeſſions in England, inſtead of all that which was taken away from him by the Act of the 28 H.8. *ſup 106*

And whereas it was objected, that the general words Honours and Hereditaments are explained and qualified by the ſaid words Relative ſubſequent, Which the ſaid George, or any to his uſe hath; and therefore it ſhall not be intended of any honour or Hereditament, but of ſuch whereof others are ſeiſed to his uſe, and no man can be ſeiſed of the Dignity, and therefore that the ſaid Act doth not extend to it; but that it is to be underſtood Reddendo ſingula ſingulis, and theſe words Which the ſaid George Earl hath, are ſufficient to paſs the Dignity and with this agrees the opinion of all the Judges of England in Nevil's caſe upon the like words in the Statute of the 28 H.8. in the ſeventh part of my Reports, fol. 33, & 34. *clx*

Hill. 2 Jac.

Juriſdiction of the Court of Common Pleas.

IN the laſt Term, by commandment of the King, the Juſtices of the Kings Bench, and the Barons of the Exchequer, were aſſembled before the Lord Chancellor Elſmer at York Houſe, to deliver their Opinions, whether there was any authority in our books, that the Juſtices of the common Bench may upon information made to the Court (which commonly is called ſuggeſtion) grant Prohibitions, or whether of neceſſity every Plea ought to be pending in the Court for ſuch cauſe, and the King would know their Opinions in this caſe: And the Judges took time to deliver their Opinions until this Term. And then Fleming chief Juſtice, Tanfield chief Baron. Snig, Altham, Crook, Bromely, and Doderidge. (Yelverton and Williams, Juſtices being dead ſince the laſt Term) did deliver their Opinions to the ſaid Lord Chancellor. That the Preſidents of each Court are ſufficient Warrants for their proceedings in the ſame Court; and therefore as well in the Kings Bench and in the Exchequer; as in the common Bench, the Judicial Preſidents in them are good Warrants of their proceedings, and therefore for a long time, and in many ſucceſſions of reverend Judges, Prohibitions upon information, without any other Plea pending have been granted, Iſſues tried, Verdicts and Judgments given upon Demurrer; all which being in force, they were unanimouſly agreed to give no Opinion againſt the Juriſdiction of the Court of the common Bench in this caſe, and none of the Judges of the common Bench were called, or preſent at any conference concerning this matter, & yet Laqueus confractus eſt, & nos liberati ſumus. Et, magna eſt veritas & prævalet: See my particular Treatiſe of the Juriſdiction of the common Bench in this point, by which the Juriſdiction of that Court evidently appears.

Hill. 10 Jac.

Parliament in Ireland.

THe Lords of the Council did write to the two chief Juſtices and chief Baron in theſe words, After our hearty commendations to your Lordſhips: Whereas his Majeſty for divers weighty conſiderations hath reſolved to hold a Parliament within the Realm of Ireland: And that by an Act made in the tenth year of H. 7. called Poynings Act, It is provided, That all ſuch Bills as ſhall be offered to the Parliament there, ſhall be firſt tranſcribed hither under the great Seal of that Kingdom, and having received allowance

allowance and approbation here, ſhall be put under the great Seal of this Kingdom, and ſo returned thither to be preferred to the Parliament; foraſmuch as there are accordingly transferred hither from thence divers Bills, as well publick as private, ſome of which Bills were firſt agreed on here, ſome others were framed and conceived there, and coming now hither may happily receive amendment and alteration: We have thought meet for avoidance of any Queſtion, or inconvenience that may ariſe of the manner and form of proceedings in amending or altering of thoſe Bills, hereby to pray and require you, calling to you his Majeſtie's Attorney and Solicitor, to look into **Poynings Act**, and to conſider of ſuch courſe as ſhall be fit to be held concerning the ſame, &c. *Dat. ultimo Junij. 1612.* **Upon which in this Term the ſaid chief Juſtices, chief Baron, Attorney, and Solicitor general were aſſembled two ſeveral daies at** Serjeants Inn; **and they had not only conſidered of the** 10 H. 7. cap. 4. **called** Poynings Act; **but alſo of an Act made in the Realm of** Ireland, 3 **and** 4 Phil. **and** Mar. cap. 4. **intituled,** An Act declaring how **Poynings** Act ſhall be expounded and taken: **For by the ſaid Act of the** 10 H. 7. **it is provided, that no Parliament be hereafter holden in the ſaid Land of** Ireland, **but at ſuch ſeaſons as the Kings Lievtenant and Councel there firſt do certifie the King under the great Seal of that Land, the cauſes and conſiderations, and all ſuch Acts as to them ſeemeth ſhould paſs in the ſaid Parliament: And ſuch Cauſes, Conſiderations, and Acts affirmed by the King and his Councel, to be good and expedient for the Land, and his Licenſe thereupon, as well in affirmation of the ſaid cauſes and Acts, as to ſummon the ſaid Parliament under the great Seal of** England **had and obtained: That done, a Parliament to be had and holden after the form and effect before rehearſed: And if any Parliament be holden in that Land hereafter, contrary to the forme and proviſion aforeſaid, it be deemed void and of none effect in Law. Upon which Act, divers doubts and ambiguities were conceived, ſome whereof were of greater difficulty than others: And firſt, A Doubt was conceived, whether the ſaid Act of the** 10 **of** H. 7. **does extend to the Succeſſors of** H. 7. **for that the Act ſpeaks only of the King generally, and not of his Succeſſors.** 2. **If the Queen** Mary **were within the Word King; and although theſe were not matters of great ambiguity, for that this word King, which imports his politick capacity, which never dies, and being ſpoke indefinitely, does extend in Law to all his Succeſſors, yet is this ſo expounded in the ſaid Act of** 3 **and** 4 Phil. **and** Mar. **Viz. That the ſaid Act of the** 10 **of** H. 7. **ſhall extend to the Kings and Queens Majeſty, her Heirs and Succeſſors. Secondly, Where the Act of** Poynings **ſaies,** The Kings Lievtenant and Councel there, **a ſcruple did ariſe, that if the King appoint one by the name of his Deputy, or Lord Juſtice, or if he conſtitute two Lords Juſtices, chief Governor or Governors, and the Council,** &c. **and therefore it is explained in the Act of the** 2. **and** 3. Phil. **and** Mar. **that the ſaid Act of** Poynings **extends to all of them. Thirdly, the greateſt and moſt difficult doubt was upon theſe words of the Act of** Poynings: And ſuch Cauſes, Conſiderations, and acts affirmed by the King and his Councel to be good and expedient for that Land, &c. **Whether the King may make any change or alteration of the Cauſes, conſiderations, or Acts which ſhall be tranſmitted hither from the Lievtenant and council of** Ireland, **for that it is not affirmative, but correction and alteration of them; and therefore it was neceſſary to explain, that the Act of the** 3 **and** 4 Phil. **and** Mar. **was in theſe words,** Either for the paſſing of the ſaid acts, and in ſuch form and tenor as they ſhould be ſent into **England**, or elſe for the change or alteration of them, or any part of the ſame. **Fourthly, Another Queſtion was upon the words of the firſt Act,** Viz. That done, a Parliament to be had and

The word *King* extends to his Succeſſors.

The word *King* extends to the word *Queen*.

and holden, &c. If at the ſame Parliament other Acts, which have been affirmed or altered here, may be enacted by the Authority of the Parliament there, the which is explained by the ſaid laſt Act in theſe words, Viz. For paſſing and agreeing upon ſuch Acts, and no others, as ſhall be ſo returned under the great Seal of England. Fiftly, Great doubt did ariſe on theſe Words, That done a Parliament to be holden, whether the Lievtenant and Council of Ireland, after the Parliament begun, and Pendente Parliamento, may upon debate and conference had there, tranſmit any other conſiderations, Cauſes, Tenors, Proviſions, and Ordinances, as ſhall ſeem to them to be good to be enacted of the ſaid Parliament within the Realm of Ireland, the which is explained by the ſaid 3 and 4 Phil. and Mar. by expreſs words, that they may.

Note Reader, the Order of Proceedings and Summons of Parliament in Ireland; Firſt, the Lievtenant and Council do certifie under the great Seal of Ireland the cauſes and conſiderations of all ſuch Acts, as ſeem good to them to be paſſed in Parliament, ſo that Originally it is to begin there. 2. They are to be affirmed, altered, or changed, and returned under the great Seal. 3. Licenſe under the great Seal to ſummon and hold a Parliament. 4. To be done *Pendente Parliamento*, as it apears ought to be.

And it was unanimouſly reſolved, that the Cauſes, conſiderations and Acts tranſmitted hither under the great Seal of Ireland, ought to be kept and preſerved here in the Chancery of England, and ſhall not be remanded. 2. If they be affirmed, they ought to be tranſcribed under the great Seal & returned into Ireland, & all that which paſſes the great Seal, ought to be enrolled here in the Chancery. 3. If the Acts tranſmitted hither be in any part altered or changed here, the Act ſo altered and changed, ought forthwith to be returned under the great Seal of England; but the tranſcript under the great Seal of Ireland, which remains in the Chancery here, ſhall not be remanded: but the amendment ſhall be under the great Seal of England, as aforeſaid, returned into Ireland, without any ſignification or certification of their allowance by thoſe in Ireland, for as the Acts move originally from Ireland, ſo the amendments or alterations move here in Eng. all the Bills which are tranſmitted here from Ireland, are with the petition of the Deputy and Council of the King altogether under the great Seal of Ire. & ſo alſo the Acts which are affirmed or altered, are returned together under the great Seal of Eng. See 10 H. 6. 8. which begins, Mich. 18 H. 6. Rot. 46. coram Rege, how the Parliament in Ireland was holden there before Poynings Act. And ſee another Act made at the Parliament in Ireland in the ſame year of 10 H. 7. c. 22. it is enacted, that all Statutes late made within this Realm of England concerning or belonging to the common and publick-Weale of the ſame, from henceforth to be deemed good and effective in the Law, and over that, be accepted, uſed and executed within this Land of Ireland, in all points, at all times requiſite, according to the tenor and effect of the ſame: And over that, by the Authority aforeſaid, that they and every of them be authoriſed, proved, and confirmed within the ſaid Realm of Ireland and if any ſtatute or ſtatutes have been made within this ſaid Land heretofore to the contrary, that they and every of them by the authority aforeſaid, be adnulled and revoked, void and of none effect in the Law. And obſerve, that this word (late) in this act, hath the ſame ſence as (before) ſo that this Act extends to all Acts of Parliament made in England before the Act of 10 H. 7. And that is the reaſon, that all Acts of Parliament made in England before this Act concerning Ireland, but onely general Acts made ſince the ſaid Act of 10 H. 7. do not bind them, becauſe that (as it hath been ſaid) they have a Parliament for the Realm of Ireland, and thoſe of Ireland do not come to our Parliament, vid. R. 3. 12.

Hibernia

Hibernia habet Parliamenta & faciunt leges, & noſtra ſtatuta non ligant eos, quia non mittunt Milites ad Parliamentum, ſed perſonæ eorum ſunt Subjecti Regis, ſicut Inhabitantes Calinæ, Goſcogniæ & Guienæ.

But queſtion is made of this in ſome of our Books, Vid. 20 H.6.8.32 H. 6.25. 1 H.7. 3. 8 H.7.10. 8 Rich.2. proceſſe 204.10 Ed. 5.41. 13 Ed. 2 titulo baſtard, 11 H.4.7.7 E.4.27. Plowdens Comment. 368. 13 Eliz. Dyer 35.2 Eliz. Dyer 366. Calvins Caſe in the ſeventh part of my Reports 226. 14 Ed. 3. 184. A Prebend in England is made Biſhop of Dublin in Ireland, his Prebendary is void. Note. Note.

See the Statute of Ireland, upon what Books and Acts of Parliament: this queſtion is now by common experience and opinion without any ſcruple reſolved, That the Acts of Parliament made in England ſince the Act of the 10 H.7. do not bind them in Ireland; but all Acts made in England before the 10 H.7. by the ſaid Act made in Ireland An. 10 H. 7. cap. 22. do bind them in Ireland. Where a Statute in *England* is of force in *Ireland*.

NOte, that Camden King at Armes told me, that ſome held, that if a Baron dies, having iſſue divers Daughters, the King may confer the Dignity to him who marries any of them, as hath been done in divers caſes, Viz. In the caſe of the Lord Cromwell, who had iſſue divers Daughters, and the King did confer the Dignity upon Burchier who married the youngeſt Daughter, & he was called Lord Cromwel: And ſo in other caſes: And he ſaid, that the Earl of Glocester, who had married the Daughter of King Henry the third, and the Counteſs after Married Mount Hermer, who was her Husbands Secretary, for which the King Impriſoned him; and after being reſtored to the Kings Favour, during the minority of the Son of the ſaid Earl of Glocester, and until the Infant came of full age, and when the Infant was of full Age, he was called to the Parliament by the name of the Earl of Glocester, and the other by the name of Mount Hermer Knight; and he ſaid, that it appears in the Edict, or Statute made in France, that if any be made Duke, Marqueſs, Earle, or Baron of any priviledged place, as of Guiſe, &c. if he die without Heir Male of his body; the Dignity is not only extinct, but the King ſhall have the Mannor or Territory whereof he took his name and Dignity: Sed nos non habemus talem conſuetudinem. Dignity. Prerogative. c. & barony in fee.

NOte (by Linwood) that it appears that by the Canons Eccleſiaſtick, none may exerciſe Eccleſiaſtical Juriſdiction, unleſs he be within the Orders of the Church, becauſe none may pronounce excommunication, but a ſpiritual perſon: And there it appears, that as well the Regiſter as the Judge ought to be ſpiritual; but now by the Statute of the 37 H.8. cap. 17. A Doctor of Law or Regiſter, although he be a Lay-man may execute Eccleſiaſtical Juriſdiction. Eccleſiaſticall juriſdiction.

Note alſo, that by the Canons no Eccleſiaſtical Judge ought to cite any Church-warden to the Court, but ſo as he may return home again to his houſe the ſame day.

Alſo the Canons do limit how many Courts Ex Officio they may have within a year.

Mich.

Mich. 11. Jac.

Cuſtom, of *London.*

NOte, that if a man give to one of his Children a certain ſum in his life, & after dies, although this is not given as a Childs full Portion, yet it ſhall be ſufficient for him: but if the Father by Writing, or by Will does declare that it is but part of a Childs Portion, then he ſhall have a full Childs part, otherwiſe not: But ſome made a difference, where this ſum ſo given, and declared to be put for part, ſhall be accounted upon account parcel of the intire Eſtate, or not; that is to ſay, if the Iſſue ſo in part advanced, ſhall have ſo much as amounts to a Childs part, & that the Wife and the Executor ſhall gain thereby, where that this Portion is ſo given, ſhall be of no benefit to the Wife or the Executors.

As if a man hath two Children, & gives to one of them a hundred pound in part of his advancement, and then dies worth 900 l. in this caſe the Wife, the Iſſue not advanced, and the Executors ſhall have but three equal parts of the 900 l. Viz. three hundred pounds apeice; and then this hundred pound ſo given ſhall be in Hotchpot between the Children: which (as I think) cannot be; for then there ſhall not be equality among the Iſſues, as the Cuſtom doth require, who ought in my opinion to have the precedency of favor, if any be.

Deviſe.

Note, it was holden by the Judges in the Kings Bench, that if a man be poſſeſſed of a houſe & term for years, doth deviſe for years, dos demiſe this to his Wife for life, the remainder over, and dies, all his debts being paid; if the Widdow enters generally, and converts the profits to her own uſe, and not to pious works; this is a determination of her Election: And this is the general caſe, and therefore it is good that it be ſpecially found.

Hayne's *Caſe.*

Felony to ſteal a Winding ſheet,

NOte, in the Lenten Aſſiſe holden at Leiceſter 11, & 12. Jac. the caſe was, That one William Hayne had digged up the ſeveral Graves of three Men and one Woman in the night, and had taken their winding Sheets from their bodies, and buried them again, And it was reſolved by the Juſtices at Serjeants Inne in Fleetſtreet, that the property of the Sheets remain the owners, that is, in him who had property therein, when the dead body was wrapped therewith, for the dead body is not capable of it, as in 11 H. 4. If Apparel be put upon a Boy, this is a Gift in the Law, for the boy hath capacity to take it, but a dead body being but a lump of earth, hath no capacity; alſo it is no gift to the perſon, but beſtowed on the body, for the reverence towards it, to expreſs the hope of Reſurrection. Alſo a man cannot relinquiſh the property he hath to his Goods, unleſs they be veſted in another; and accordingly at the ſaid Aſſiſes, he was ſeverally indicted for taking of each of theſe Sheets: And the firſt Indictment was of petty Larceny, for which he was whipped; And at the ſame Aſſiſes he was alſo indicted for the Felonious taking the three other Sheets, for which he had his Clergy, and ſo eſcaped the ſentence of death, which he well deſerved, for this inhumane and barbarous Felony.

Who hath propriety in them.

Hill. 11. Jacobi.

Earl of Derbie's Caſe.

IN the Chancery, between Sir John Egerton Plaintiff, and William Earl of Derby, Chamberlain of Cheſter, and others, Defendants, for the truſt and intereſt of a Farm called Budſhaw in the County of Cheſter: It was reſolved by the Lord Chancellor, the chief Juſtice of England, the Maſter of the Rolls, Doderidge and Winch, Juſtices. County Palatine.

1. That the Chamberlain of Cheſter, being ſole Judge of Equity, cannot decree any thing wherein himſelf is party, for he cannot be a Judge in propria cauſa: but in ſuch caſe where he is party, the Suit ſhall be heard here in the Chancery, Coram Domino Rege.

2. If the Defendants dwell out of the County Palatine, he who hath cauſe to complain in equity, may alſo complain here in the Chancery, for in reſpect that proceedings in Chancery do bind the perſon only, if the perſon be out of the Juriſdiction, the Chamberlain of Cheſter cannot relieve the party; and therefore, Ne curia Domini Regis deficeret in juſtitia exhibenda, the Suit ſhall be here in the Chancery; for elſe the Subject ſhall have good right, and yet have no remedy, which will be inconvenient.

And this does purſue the reaſon of the Common Law, as appears 13 Ed. 4. tit. Juriſdiction. 8 Ed. 2. Aſſ. 382. 5 Ed. 3. 30. 30 H. 6. 6. 7 H. 6. 37. The Caſe of the Lord of the Marches of Wales, although an Action will lie in Wales, yet becauſe he which hath cauſe of Action cannot have Juſtice there, he ſhall ſue here in the Kings Bench; for where the particular Courts cannot do Juſtice to the parties, they ſhall ſue in the Kings general Court at Weſtminſter, 11 H. 4. 27. 8 Ed. 4. 8. in all caſes where it appears to the Court, that thoſe who have liberties to take Conizans, do fail of right, as in matter of foreign plea, &c. the matter ſhall be determined in the general Courts at Weſtminſter.

3. It was reſolved, that the King cannot grant a Commiſſion to determine any matter of equity, but it ought to be determined in the Court of Chancery, which hath had Juriſdiction in ſuch caſe time out of mind, and had always ſuch allowance by the Law: But ſuch Commiſſions or new Courts of equity ſhall never have ſuch allowance, but have been reſolved to be againſt Law, as it was agreed in Potts caſe. Note, Cauſes in equity may not be determined by Commiſſion.

4. Upon conſideration had of the Certificate of the Lord Dyer and other Juſtices in the time of Queen Elizabeth, concerning the Juriſdiction of the County Palatine of Cheſter; It was reſolved, that for things tranſitory, although that in truth they be within the County Palatine, the Plaintiff may by Law alledge them to be done in any place within England, and the Defendant may not plead to the Juriſdiction of the Court, that they were done within the County Palatine: See Dyer 13 Eliz. fol. 302. 316. Office found by Mandate out of Chancery of Land in Cheſhire is void.

Forms and Orders of Parliament.

Proceedings in Parliament.

IN the Houſe of Commons, when the Speaker is choſen, he in his place where he firſt ſhall ſit down, ſhall diſable himſelf, and ſhall pray that they would proceed to a new Election: but after he is put into the Chair, then he ſhall pray them, that with their favours he may diſable himſelf to the King, ſo that their expectations may not be deceived.

But note, that the King the firſt day of Parliament ſhall ſit in the upper houſe of Parliament, and there the King, or the Lord Chancellor by his commandment, ſhall relate and ſhew the cauſes of calling the Parliament, the which are beſt founded on the words of the Writ of Summons of Parliament (which is a good Subject to treat on, &c.) and then in the concluſion of the Oration, the Commons are commanded to chuſe a grand and learned man to be their Speaker. Upon which the Commons ſhall preſently aſſemble themſelves in the lower houſe, and he is to be a Member of their Parliament, and hereupon he ſhall diſable himſelf, ut ſupra.

And two or three days after, the Commons ſhall preſent their Speaker in the upper houſe to the King, where he ſhall diſable himſelf again to the King, and in moſt humble manner ſhall intreat the King to command them to chuſe a more ſufficient man: And after he is allowed by the King, then he ſhall make an Oration, and in the concluſion ſhall pray the four uſual Petitions; the which Oration being anſwered by the Lord Chancellor, and his Petitions allowed, the Speaker and the Commons ſhall depart to the houſe of Commons, where the Speaker in the Chair ſhall requeſt the Commons, that inaſmuch as they have choſen him for their mouth, that they would aſſiſt him, and favourably accept his proceedings, which do proceed out of an unfeigned and ſincere heart to do them Service.

Note, in the lower houſe, when a Bill is read, the Speaker does open the parts of the Bill, ſo that each Member of the houſe may underſtand the intention of each part of the Bill; and the like is done by the Lord Chancellor in the upper houſe; then when it is read the ſecond time, ſometimes it is ingroſſed without any Commitment, but then the Speaker makes queſtion of it in this manner: The queſtion is, Whether this Bill ſhall be engroſſed, or not. As many as would have the Bill ingroſſed, ſhall ſay, Yea; and as many as would not, ſay, No.

But in the upper houſe of Parliament, when ſuch queſtion is made about engroſſing, if there be no contradiction, the Lords do not deliver their aſſent in ſaying, Content, or their diſſent in ſaying, Not content, for husbanding the time: but if there be any contradiction, it is tried Seriatim, by Content, or Not content; but neither in the upper or lower houſe, the Lord Chancellor or Speaker, ſhall not repeat a Bill or an amendment but once.

When a Bill is committed to the ſecond reading, then if the Committees amend it in any point, then they ſhall write down their amendments in a paper, and ſhall direct to a line, and between what words the amendments ſhall be put in, or what words ſhall be interlined, and then all ſhall be ingroſſed in a Bill.

And

And if a Bill paſs in the Commons houſe, and the Lords amend the Bill when it is ſent to the upper houſe, they do as before ſhew the line, and between what words, and after the amendments are ingroſſed with particular references, and the Bill with the amendments are ſent again to the houſe of Commons where they affirm them: the amendments are read three times, and then they inſert them into the body of the Bill, and ſo è converſo of a Bill which paſſeth firſt in the upper houſe. But note, that in one of theſe caſes the entire Bill ſhall not be read again in the houſe wherein they firſt paſs, but the amendments only; for no Bill ſhall be read above three times.

No Lord ought to ſpeak to the Bill two times in one day: Alſo no Knight, Citizen or Burgeſs ought to ſpeak above once to one Bill in one day, unleſs ſometimes by way of explication.

No private Bill ought to be read before the publick Bills, unleſs the one houſe or the other do require it.

Note, in the houſe of Commons, thoſe that are for the New Bill (if there be a queſtion of voices) ſhall go out of the houſe, and thoſe who are againſt the Bill, and for the Common Law or any former Law, ſhall ſit ſtill in the houſe; for they are in poſſeſſion of the old Law: And in the upper houſe two Lords are appointed, one of the one part, the other of the other to number the voices.

In both houſes, he which firſt ſtands up to ſpeak, he ſhall firſt ſpeak, without any difference of perſons.

When a Bill is ingroſſed at the third reading, it may be amended in the ſame houſe in any matter of ſubſtance, à fortiori; the error of the Clerk in the ingroſſing may be amended, &c.

Paſch. 12. Jac.

Walter Chute's Caſe.

WAlter Chute Sewer to the King, did exhibit a Petition to the King, that for the ſafety of the Realm, and the ſecurity of ſtrangers within the Realm, that the King would vouchſafe to erect a new Office of Regiſtring of all ſtrangers within the Realm, except Merchant-ſtrangers, to be kept at London, and to grant the ſaid Office to the Petitioner, with a reaſonable Fee, or without a Fee: And that all ſtrangers, except Merchant-ſtrangers, might depart the Realm within a certain convenient time, if they do not repair to the ſaid Regiſter, and take a Billet under the Regiſters hand: Which Petition the Lords of the Council did refer to me, by their honourable Letters of the 13 of Novemb. 1613, that I calling to me Council learned in the Law, ſhould conſider what the Law is in that behalf, and how it may ſtand with conveniency and policy of State to put the ſame in execution, and by whom it ought to be performed: And upon conference had with the Juſtices of the Common Pleas, and the other Juſtices and Barons of Serjeants-Inne in Fleetſtreet; It was reſolved, that the erection of ſuch new Offices, for the benefit of a private man was againſt all Law, of what nature ſoever: And therefore where one Captain Lee did make ſuit to

New erected Office void.

the King to have a new Office to make Inventory of Goods of thoſe who did teſtate or intеſtate: It was reſolved by the Lord Chancellor and my ſelf, that ſuch Grant ſhall be utterly void, although no certain perſon hath it, and that this was againſt Common Law, and the Statute of 21 H.8. In like manner another ſued to have the Regiſtring of Birth-days, and the time of the death of each perſon within the Realm, and that it might be on Record and authentical: So Mich. 19 Jac. To make a new Office in the upper Bench, for the only making of all Latitats at the Suit of the Lord D'aubigny, and after him of the Lord John Hungerford, and others, was reſolved to be void. So Littleton's Suit, to name an Officer to be a general Regiſter, or rather Tabler, or Indexer of all Judgments, for Debts and Dammages, Recognizances, Bills, Obligations to the King, Deeds inrolled, Fines upon Offenders in the Star-Chamber, and other Courts whatſoever: and this was pretended to be for the benefit of the Purchaſer, and the ready finding of Records; and to ſuch purpoſe was made the Statute of the 27 Eliz. for inrolling of Statutes; but the Suit was rejected by the two chief Juſtices and others: for every Court ſhall chuſe Officers either by Law or Preſcription: the Law or Cuſtom may not be changed without a Parliament, and ſo it was reſolved Hill. 12 Jac. Regis; and divers other ſuch inventions were reſolved to be againſt Law and Record.

As to the ſecond, in the caſe of Sir Walter Chute, concerning the conveniency or inconveniency of it, it was reſolved, that it was inconvenient for divers cauſes. 1. For a private man to have private ends. 2. The numbring of ſtrangers by a private man would infer a Terror, and the King and Princes of other Countries will take offence at it, and will do the like to the Kings Subjects. 3. It is to be conſidered, what breach it will be to former Treaties.

As to the third, in the caſe of Sir Walter Chute, that may be performed without any inconvenience; and ſo it was deviſed by the Lord Burleigh, and other Lords of the Council: An. 37 Eliz. viz. To write Letters to the Mayors, Bayliffs, or other head Officers of every City, Borough, or Town where any ſtrangers are reſident, to certifie how many Strangers, and of what quality are in their Cities, &c. the which they are to know in reſpect of their Inhabitants and Contributions to the poor, and other charges, and this may be done without any writing.

Which Suit being made to the Lords, was well approved by them, and the Suit utterly diſallowed the 3 Dec. An. 3 H.8. Commiſſion granted to divers, to certifie the number of Strangers, Artificers, with the number of their Servants within London, and the Suburbs thereof, &c. according to the Statutes: See Candiſh caſe 29 Eliz. for making of all Writs of Superſedeas in the Kings Bench.

13 Eliz. A grant of an Office to Thomas Knivet, to examine all his Majeſties Auditors and Clerks of the Pipe concerning their Offices for years: It was reſolved by the Court to be againſt Law, for it belongs to the Barons who are Judges: And it is alſo an Innovation in a Court of Juſtice. 25 Eliz. A grant of an Office to Thomas Leichfield to examine all deceits, falſe allowances of the Queens Officers for eight years, reſolved to be void.

The making of Subpœna's in Chancery, anciently belonged to the ſix Clerks: The late Queens Majeſty granted the ſame by Patent to one particular man.

The

The keeping and filing of Affidavits in Chancery, anciently belonged to the Regiſter. The Kings Majeſty that now is, granted the ſame to one particular man.

The erecting and putting down of Inns hath been anciently in the power of the Juſtice of Peace. His Majeſty hath given that power by Patent to a particular man.

The taking of the Depoſitions, and all other proceedings before and by the Commiſſion which hath uſed to be taken and kept by the Commiſſioners themſelves, or ſome Clerk of their appointment; his Majeſty hath granted the ſame by Patent to one particular man.

The King by his Letters Patents granted to Simon Darlington the Office of Alneger, and limited what Fees he ſhould take.

The ſole drawing, writing, and ingroſſing of all Licenſes and Pardons was granted to Edward Bacon Gent. with the Fee that had formerly been taken, and a reſtraint for all others, &c.

The Offices of Subpœna's was granted to Thomas George, and others, during life, with the Fee of 2 s. and a reſtraint that no others preſume to make thoſe Writs.

The Office of making and Regiſtring all manner of Aſſurances and Policies, &c. was by Letters Patents granted to Richard Gandler Gent. with ſuch Fees as the Lord Mayor and others ſhould rate, with power to rate Fees, and a reſtraint of all others, &c. which was during pleaſure, and afterwards to him and others during lives.

The Office of writing Tallies and Counter-Tallies granted to Sir Vincent Skinner.

The Office of ingroſſing Patents to the great Seal, and an increaſe of Fees granted late to Sir Richard Young, and Mr. Pye. Quære. If not to all.

Sir Stephen Procter's Caſe.

IN an Information preferred in the Star-chamber by the Attorney-general, againſt Stephen Procter, Berkenhead, and others, for Scandal and Conſpiracy of the Earl of Northampton, and the Lord Wooton. At the hearing of this caſe were preſent eight Lords, ſcil. the chief Baron, the two chief Juſtices, two Biſhops, one Baron, the Chancellor of the Exchequer, and the Lord Chancellor: And the three chief Juſtices, and the Temporal Barons condemned Sir Stephen Procter, and fined and impriſoned him: But the Lord Chancellor, the two Biſhops, and the Chancellor of the Exchequer acquitted him. And the Queſtion was, if Sir Stephen Procter ſhall be condemned or acquitted; and it ſeemed to ſome of the Clerks Prima facie, that the better ſhall be taken for the King, and that he ſhall be condemned. But others were of the contrary Opinion; and hereupon the matter was referred to the two chief Juſtices, calling to their aſſiſtance the Kings learned Council: And firſt they reſolved, that this Queſtion muſt be determined by the Preſidents of the Court of Star-chamber, for that Court is againſt the Rule and Order of all other Courts, for in the Kings Bench, the Common Pleas, or the Exchequer, or in the Exchequer-chamber, where all the Juſtices are aſſembled, if the Juſtices are equally divided, no Judgment can be given. And ſo it is in the Court of Parliament; and therefore this courſe ought to be warranted Judges divided in the Star-chamber.

warranted by the cuſtome of the Court: And as to that, two Preſidents only were produced for the maintenance of the ſaid Cuſtome, viz. One in the Hilary Term, 39 Eliz. between Gibſon Plaintiff, and Griffith and others Defendants; where the complaint was for a Riot, and at the hearing of the caſe, there was eight preſent, four gave their Judgments that the Defendants were guilty; but the other four, whereof the Lord Chancellor was one, pronounced the Defendants not guilty, and no ſentence of condemnation was ever entred, becauſe the Lord Chancellor was one of the four who acquitted them. The other was Hill. 45 Eliz. in an Information by the Attorney-general againſt Katharine and others, for forging of a Will, and a Miſdemeanor for procuring a fraudulent Deed to defeat the Queen of her Eſcheat: And eight were in preſence at the hearing of the cauſe, whereof four found the Defendants guilty of Forgery, and did inflict the puniſhment according to the Statute of the 5 Eliz. but the others, whereof the Lord Chancellor was one, gave ſentence, that the Defendants were guilty of the Miſdemeanor, and not of the Forgery, and impoſed a Fine of 500l. only: which decree was entred according to the Lord Chancellor's voice, although the ſentence on the other ſide was more beneficial for the King, and no other preſident could be found in this caſe, the which I have reported this Term.

Concerning Benevolence.

NOte, the Exaction under the good name of Benevolence, began in this manner:

When King Edward the fourth had a Subſidy granted to him in the 12 Edw. 4. by Parliament, becauſe he could have no more by Parliament, and without a Parliament he could not have any Subſidy to be levied of the Lands and Goods of the Subject, he invented this ſhift or device, in which three things are to be obſerved:

1. The Cauſe.
2. The Invention.
3. The Succeſs.

Hollingſhead, 11 Ed. 4. 694. Stow 701.

1. the Duke of Burgundy, who had married Margaret, the Siſter of Edw. 4. ſolicited King Edward to joyn in War with him againſt the French King, to which the King eaſily conſented, becauſe he ſought revenge againſt the French King for aiding the Earl of Warwick, Queen Margaret, and Prince Edward, and their party; and therefore, to make War againſt the French King was the cauſe.

2. The Invention was, The King called before him at ſeveral times a great number of the Wealthieſt of his Subjects, to declare to them his neceſſity, and his purpoſe to levy War for the honour and ſafety of the Kingdom, and demanded of each of them a certain Sum of Mony, and the King treated with them, with ſuch great grace and clemency, and with ſuch gentle prayer to aſſiſt him in his neceſſity, for the Honour of the Realm, that they very freely yielded to his requeſt, for the honour and ſafety of the Realm; amongſt the reſt, there was a Widow of a very good Eſtate, of whom the King meerly asked, what ſhe would willingly give him for the maintenance of his Wars; By my faith, quoth ſhe, for your lovely countenance ſake, you ſhall have twenty pound, which was more than the King expected; the King thanked her, and vouchſafed to kiſs her, upon which ſhe preſently ſwore, he ſhould have twenty pound more.

3. The ſucceſs and event was, That whereas the King called this a Benevolence to pleaſe the people, yet many of the people did much grudge at it, and called it a Malevolence.

Primo

Primo Ed.5. in the Oration of the Duke of Buckingham in Guild-Hall in London, he inveighed, amongſt other things, againſt this Taxation under the name of Benevolence, 1 Rich.3. cap.2. the Subjects of the Realm ſhall not be charged with ſuch charge or impoſition called Benevolence, which tendeth to the ſubverſion of the Law, and deſtruction of Commonalty, as appears in the Preamble (where any ſuch charge.) And that ſuch exaction before taken, under the name of Benevolence, ſhall not be drawn into example to make ſuch or the like charge, but ſhall be damned and annulled for ever: But it appears by the Preamble, that this was againſt the will and liberty of the Subject, but free-will offering is not reſtrained.

An. 6 H.7. The King declared in Parliament, that he had juſt cauſe of War againſt the French King, which for the cauſes there ſhewn was approved, and for that he deſired a Benevolence towards the maintenance of it; and every one promiſed his helping-hand, the which the King greatly commended; and to the intent that the poorer ſort might be ſpared, he demanded it by way of a Benevolence, according to the example of Edw. 4. and publiſhed, that he would by their open hands meaſure their benevolent hearts; and he who gives but a little, according to his gift.

By this means he collected great Sums of Money, with ſome grudge for the extremity ſhewn by the Commiſſioners, 11 H.7. cap. 20. An Act was made for levying of that Benevolence, according to their aſſent, but only of ſuch as aſſented.

An. 20 H.7. A Commiſſion to levy what was granted by 11 H.7.

Note, that 15 H. 8. a Commiſſion under the great Seal, called a Commiſſion of Anticipation, to collect the Subſidy before the day. Stow. 880.

An. 16 H.8. For War with France, a Benevolence levied by Commiſſion with great Curſes and Imprecations againſt the Council, and with ſucceſs, for it was to levy a fifth part of the value in Money or Plate againſt the good will of the Subject.

An. 26 H.8. Another Benevolence levied by Commiſſion for maintenance of War againſt France, with ill ſucceſs, for it was exacted of the Subject againſt his good will. But if the Subjects of their free-will, without any compulſion, will give to the King for publick uſes any Sums of Money, this is not prohibited by any Statute.

And the Statute 11 H. 7. cap. 18. proves this, where the Parliament compels them who have freely granted any thing to the King for publick uſe, to pay it.

Feb. An. 40 Eliz. It was reſolved by all the Juſtices and Barons, that a free Grant to the Queen without coercion is lawful, and accordingly they granted to the Queen, Quod nota bene, quia, &c.

Paſch.

Paſch. 12. Jac. Regis.

S. C. Hob. 14.

THe Caſe of Dungannon in Ireland; The caſe of the new Corporation of Dungannon in Ireland was in effect, ſcil. That the King conſtituted the Town of Dungannon to be a free Borough, Et ulterius volumus, declaramus, & ſtatuimus, quod inhabitantes villæ prædictæ ſint unum corpus corporatum per nomen Præpoſiti 12. Burgenſium & Communitatis Dungannon, & per idem nomen placitare poſſit: Et quod ipſi prædicti præpoſiti & Burgenſes & ſucceſſores ſui habeant poteſtatem eligendi duos Burgenſes,&c. ad Parliamentum,&c. And the doubt was, whether this Grant of Election of Burgeſſes of Parliament was good, for becauſe it was granted but to parcel of the Body, ſcil. To the Provoſt and Burgeſſes, and not to the Provoſt, Burgeſſes, and Commonalty; And the chief Baron thought, that foraſmuch as this was not but a nomination or election, it was ſufficient to make the Provoſt and Burgeſſes only to have it: And he took a diverſity betwixt nomination and other inheritance: But this was denied by all the Juſtices and Barons, for this power to elect Burgeſſes, is an Inheritance of which the Provoſt and Burgeſſes are not capable, for that it ought to be veſted in the entire Corporation, ſcil. Provoſt, Burgeſſes, and Commonalty: And it ſeemed to Hubbard, chief Juſtice of the Common Pleas, that the King may grant to the Inhabitants of Iſlington to be a free Borough; and that the Burgeſſes of the ſame Town may elect two Burgeſſes to Parliament: And that it ſhall be good, although that the Burgeſſes be not incorporated; for there are many Burgeſſes who elect Burgeſſes to the Parliament, which are not incorporate: But it was reſolved by all, that ſuch a Grant made by the King ſhould be void; for the Inhabitants have not capacity to take an Inheritance, as in the 15 Ed. 4. to have Common: And Littleton ſaith in his Chap. of Burgage, that the Boroughs which ſend Burgeſſes to Parliament, were the moſt ancient and principal Cities, &c. So that it ſhall be intended, that at the firſt they were incorporate. Alſo, Plus valet ſæpenumero vulgaris conſuetudo, quàm Regalis conceſſio.

But it was reſolved by Hubbard, Tanfield, Altham, Winch, Nichols, and Haughton, Quod volumus, was a good word of Grant, as Pigot was of Opinion: 21 Edw. 4. And this ſhall be an implyed Grant to all the Corporation, that the Provoſt and Burgeſſes ſhall elect, &c. And regularly, when the Grant is indefinite, ſcil. Fieſt, Concedimus an incertain thing, Et ulterius quod Præpoſitus, & Burgenſes, & Succeſſores, ſui elegerint, this ſhall be within the firſt Concedimus to all the Body, which that party ſhall chuſe: But the chief Juſtice of England, and Doderidge thought the contrary, for in this caſe there was but an Ordinance to erect the Corporation; and no grant altogether to any perſon, ſo that this clauſe, Et quod,&c. is idle and vain.

And Note, all the new Corporations were of the ſame form, and in none of them is any clauſe to elect new Burgeſſes, ſo that when thoſe of the modern Burgeſſes die, this power to elect Burgeſſes is gone.

Mich.

Mich 12. Jac. Regis.

A Queſtion was moved to the chief Baron, and the Juſtices of Serjeants Inn in Chancery Lane; That if a Felon be convict either by verdict or confeſſion, If immediately by his conviction, his Goods and Chattels be forfeited: And it was ſaid, that if the Felon after his conviction pray his Clergy, that then clearly he ſhall forfeit his Goods and Chattels, for Quodammodo this is a ſlight, becauſe he refuſeth to be adjudged by the common Law, and flies to the priviledge of the holy Church. But it was reſolved by the chief Baron and the Juſtices, that immediately by his conviction his Goods and Chattels are forfeited; and the praying of his Clergy is not any forfeiture, for then in caſe where he cannot have his Clergy, he forfeits nothing untill his Attainder, which none will affirm. And with this agrees Stamford. fol. 192. a. where he ſaies, that the Goods of a Felon are forfeited, which he hath the day of the verdict given; and this is proved alſo by the Statute of 1 R. 3. where it is admitted, that the Goods of a Felon convict are forfeited and may be ſeiſed. And of the ſame Opinion was the chief Juſtice, and the Juſtices of Serjeants in Fleet Street: vid. Trin. 41. Eliz. 332.

Mich. 12. Jac. Regis.

Anne Hungate's Caſe in Cam. ſtell.

IN this very Term a great caſe was heard and determined in the Star-Chamber, between Sir Henry Day, who dyed, pendent the Bill, and Anne his Wife, and Nicolas Bedingfield Eſquire, and Elizabeth his Wife, Plaintiffs: And Anne Hungate Widdow, Sir Robert Wind, Henry Branthwait Eſquire, Thomas Townſend Eſquire Thomas Blomfield Gent, and George Min Gent. Defendants; and the caſe in effect was: That Henry Hoogan Eſquire, being ſeiſed of the Mannor of Hamonds, and of divers Lands of Eaſt Bradenham, &c. in the County of Norfolke in Fee, by Deed made a Feoffment of them to the uſe of the ſaid Anne who took Hungate to Husband, and She had Iſſue by him a Son and a Daughter, and he dyed: And Anne obtained a Grant of the Wardſhip of the Son, and after when the Son was of the Age of one and twenty years, ſaving ſix weeks, By Dedimus poteſtatem, directed to Sir Robert Wind, Henry Branthwait then Feodary, and Thomas Townſend, they took Cognizance of a Fine of the ſaid Son, being then of the age aforeſaid, and ſick: And the Bill charged them all with practice in procuring the ſaid Son to acknowledge the Fine; they all knowing that the ſaid Son was within age, and in Ward of the King in Cuſtody of the ſaid Anne: But there was not any practice or circumvention uſed by any of the Defendants to procure the ſaid Son to acknowledge the ſame, but the Son of his owne good will levied it. And by Indenture the uſe was limited to his Mother, the ſaid Anne and her Heirs, with power of revocation by the

Son upon tender of ten ſhillings &c. and this was in conſideration, that the Mother had paid the Debts of his Father to a very great value, and had obtained the Wardſhip of him, and that her Joynture ſhould be confirmed; And that his Mother, if ſhe pleaſed might give it to his Brother which ſhe had by Hungate, who was of half blood; and it appeared that the Mother knew the Son to be within age, but the Commiſſioners, for any thing that was proved, were ignorant of it, nor did they ſend for the Book of the Church, in which his age appeared being in the ſame Pariſh.

And the Council for the Plaintiff prayed, that the Defendants ſhould be puniſhed for their miſdemeanor; and that the ſaid Women being Plaintiffs, who were Coſins. &c. Heirs to the ſaid Son, of the entire Blood, who ſhould be diſinherited by the ſaid Fine. To which it was reſolved by the two chief Juſtices, and the chief Baron, that there was not any crime puniſhable by the Law in this caſe: For the Judges of Law, and of this Court may puniſh ſuch Offences, & Crimes as are determinable in this Court: But the Judges cannot create Offences, nor do as Hannibal did, to make his way over the Alpes, when he could find none, for Judicandum enim legibus; et ubi non eſt lex, nec eſt tranſgreſio: And for this, when the Infant levied the Fine, if it be not reverſed during his minority, the Fine is unavoidable in Law, and the Heirs of the Infant have not any remedy by the Law to reverſe it, the cauſe is for this, that the age of the Infant is not to be tried but by inſpection of his perſon: Non teſtium teſtimonio, non juratorum veredicto, ſed judicis inſpectione ſolummodo: But the Judges as by adjuncula, may inform themſelves by Witneſſes, Church Books, &c. And the reaſon of it is, that the Fine ſhould otherwiſe as well loſe its effects as its name, for Dicitur finis ab effectu; quia finem litibus imponit: And if Infancy ſhould be tryed otherwiſe then by inſpection, no man ſhall be ſure of his Inheritance: for after the death of the Cognizor, averment may be made many years after! That the Cognizor was within age at the time of the Fine; and ſo many records avoided by naked averment, which ſhould be againſt Law, and the cauſe of great vexation and ſuit, and Fitz. N.B. fol. 21. If an Infant levy Fine, he ſhall have a Writ of Error during his non-age, and aſſign it for Error; and this is Error of the Court in Law, and ſhall be tried by the Judges of Law.

And for this it was reſolved by the ſaid Juſtices, That foraſmuch as no corruption and circumvention was proved in the Commiſſioners, or in any of the parties, of which they may be indicted at the Suit of the King, or puniſhed in this Court, but the Fine ſhall ſtand.

And it was not apparent to the Commiſſioners, that he was within age, foraſmuch as he wanted but ſix weeks of his full age, but if the Commiſſioners had knowledge that he was within Age, then this had been miſdemeanor in them: For it was ſaid, that Fines and Recoveries are like to the Pole Artique and Antartique, for upon theſe aſſurances of lives depends; for which by naked averment they cannot be ſhaken or impeached, for which divers notable Preſidents have been concerning the matter in queſtion in this Court.

And for this, in this Court, Mich. 24. and 25 Eliz. 14. between William Cavendiſh and Anne his wife one of the Co-heirs of Henry Knightley, againſt Robert Worſley, and Katharine Lanter Co-heir, and Trafford, and other Defendants. And the caſe was: That Robert Worſley and Katharine his Wife being within age acknowledged a note of a Fine before Trafford, and another of the Defendants, by Dedimus Poteſtatem: And the Decree ſaid, that the Commiſſioners did perfectly know that the ſaid Katharine was within age; And for this cauſe every one of them was fined, but the Fine ſtands.

Mich.

Mich. 38, and 39. Eliz. In this Court one Alexander Gilderbrand being ſeiſed of certain Lands in Windham, in Com. Norf. in Fee, one Hubbard procured one Roger who was in his Cuſtody in his Houſe, to take upon him the Name of Alexander Gilderbrand, who was then beyond the Seas, to acknowledge a Fine to the ſaid Hubbard of the ſaid Lands, and they were fined in this Court; And it was part of the Sentence, that if he did not re-aſſure the Land to the ſaid Alexander, he ſhould forfeit a greater Fine to the Quæn: But there was no Sentence to draw the Fine off from the File, nor Damages awarded to the ſaid Alexander, who was the party grieved.

Mich. 12. Jac. Regis.

Mansfield's Caſe

AN. 23 Eliz. In the Court of Wards, the caſe was this; That Henry Buſhley, ſeiſed in Fæ of certain Lands in North Mins in the County of Hertford, by his Will in writing demiſed the ſaid Lands to Henry Buſhley his Son in taile, the remainder to one William Buſhley.

And for this, that his ſon was within age, he demiſed the Education of him to Thomas Harriſon, whom he made his Executor: And afterwards it hapned, that Henry the Son became a monſtrous and deformed Cripple and proved an Idiot, à nativitate; The which Idiot by the practice of one Nicols and others, was raviſhed & taken out of the cuſtody of his Guardian, and was carried upon mens ſhoulders to a place unknown, & there kept in ſecret, untill he had acknowledged a Fine of his Lands to one Bothome, before Juſtice Southcot. An. 9. Reg. Eliz. and by Indenture betwixt them, the uſe of the ſaid Fine was declared to the uſe of the Cognizæ and his Heirs, which Bothome, An. 12 Eliz. conveyed the ſaid Land to one Henry Mansfield: And An. 12 Eliz. the ſaid Henry Buſhley the Son, by inquiſition was found an Idiot a nativitate; and upon this in An 33. the Court of Wards took order for the Poſſeſſion of the ſaid Lands, Vide Calver's caſe in my Reports.

And it was moved as a doubt in the ſaid Court of Wards, whether the ſaid Fine ſhould be to the uſe of the ſaid Idiot and his Heirs; for notwithſtanding that the Fine which is of Record binds the Idiot for the cauſes aforeſaid, yet the Indentures are not ſufficient to direct the uſes: But it was reſolved, that for as much as he was enabled by the Fine as to the Principal, he ſhall not be diſabled to limit the uſes which are but as acceſſory. *ſee 2. Ver. 403.*

And the ſame is the Law of an Infant and Feme Covert. And the ſaid Mansfield brought an Action of Treſpaſs in the common Pleas againſt one Trott, the Farmer of the ſaid Lands, and the Iſſue was to be tried at the Bar; And the ſaid deformed Idiot was ſent out of the Court of Wards, to be ſhewn to the Judges of the common Pleas, and to the Jurors there tried and ſworn: and being brought upon a mans ſhoulders, the Judges hearing that the Title of Mansfield was under the ſaid Fine levied by that Idiot, The Lord Dyer, and the Court by conſent of parties,

ſed a Juror to be withdrawn; And the Lord Dyer ſaid, that the Judge who took the Fine, was never worthy to take another; but notwithſtanding this, and although the monſtrous deformity and idiocy of Buſhley was apparent and viſible, yet the Fine ſtood good.

Mich. 12. Jac.

Warcombe and Carrel's Caſe.

20 OCt. 6 Eliz. in the Star Chamber, where were preſent Sir Nicolas Bacon Knight, Keeper of the great Seal, the Marquels of Northampton, the Earl of Weſtmerland, the Earl of Suſſex, the Earl of Leiceſter, Lord Clynton, high Admiral, Lord Strange, and Hunſden, Progers Knight, Controller of the Houſhold, Sir Francis Knols, Secretary, Sir William Peeters, Sir John Maſon, Sir Richard Sackvil, under Treaſurer of the Exchequer, Sir Robert Catlin, Maſter of the Rolls, Sir James Dyer, Juſtice del Banc. The cauſe was, That Edward Carrel, an Apprentice of the Laws, for a great Sum of Money bought the Wardſhip of Johan, Daughter and Heir of Waincomb, of the County of Hereford, and married her to Edward Carrel, his youngeſt Son: And after Hil. An. 5 Eliz. the ſaid Johan fell ſick, and being of the age of nineteen years, and not having any Iſſue, the ſaid Edward her Husband perſwaded her to acknowledge a Fine of her Inheritance, by which ſhould be conveyed an Eſtate to the Husband and Wife intail, the remainder to the right Heirs of the Wife: And Cognizans was taken by Dedimus poteſtatem directed to Sir Tho. Sanders and one Cheſnel of Grayes-Inne before Eaſter, divers Judges being here who might have examined her: And on Friday in Eaſter week ſhe died, but the Fine and l'argent du Roigne, was entred as of the laſt Term, Scil. The Term of St Hillary four daies before the death of the Wife.

And the Original Writ of Covenant bore teſte 15 Jan. returnable craſtino Pur. and the Dedimus poteſtatem 18 die Jan. And James Warcomb Coſin and Heir of the ſaid Johan, complained by Bill againſt Edward Carrel for obtaining of the ſaid Fine by indirect practice; And thereupon the ſentence of the Honourable Court enſued thus.

This day a right Honourable preſence being aſſembled in this Court, the matter depending in the ſame, between James Warcomb Eſquire, Complainant and Edward Carrel of London Gent. Defendant, as well for and concerning the validity of the fine levied by the ſaid Edward Carrel, and Johan his late Wife of certain Mannors: &c. of the inheritance of the ſaid Johan, which Johan, as the Plaintiff doth alledg, was not of full age at the time of the Fine levied; as alſo for certain ſiniſter and undue means committed and done by the ſaid Edward Carrel, in the ſuing and getting out of the ſaid Fine, as is ſuppoſed and alledged by the ſaid Complainant, was by great and long deliberation heard and examined, with all the allegations and ſayings, that could be alledged and ſaid on both parts.

Upon

Upon hearing of which matter the ſaid Fine was by the whole opinion of the Court adjudged good, available, and effectuall in the Law.

And alſo no fault adjudged to be in the ſaid Edward Carrel, in the ſuing and getting out of the ſaid Fine, but that the ſame was duly and orderly ſued out, according to the due form and order of the Lawes of this Realm And all this is within the Rule, Facta tenent multa, quæ fieri prohibentur; And the Heir hath Damnum abſque injuria, for the Law doth not give him any remedy to reverſe it, And as Edward Carrel was not puniſhed, although that he knew that his Wife was within age: ſo the ſaid Hungate ſhall not be puniſhed, although that ſhe knew that her Son was within age; and that the rather, by reaſon of the ancient Verſe.

Leges communes ſi neſcit fœmina, miles,
Clericus, & Cultor, Judex ſibi parcet & ultor.

And by ſentence all were diſmiſſed, &c.

Amongſt the Records in the Treaſury, Et inter placita coram Domino Rege de termino Sancti Mich. An. 42 Ed. 3. Rot. 27.

Cornubia Helena, filia Hugonis Allot, brought an appeal of Robbery againſt Laurence Boskofleake, Richard Cohorta: Jo. Gilmin, and Johan his Wife, and divers others; the Defendants pleaded Not guilty, &c. and were found not guilty of the Felony aforeſaid, Nec unquam ſe ſubtraxerunt, ideo prædictus Laurentius & omnes alii, &c. eunt inde quieti: Et prædicta Helena pro falſo appello ſuo committitur priſonæ in Cuſtodia Mareſcalli Ric. de Inworth, Mareſcalli, &c. Et ſuper hoc prædictus Laurentius & alii petunt juxta formam ſtatuti quod Juratores hoc inquirant quæ damna prædictus Laurentius & alij ſuſtinuerunt occaſione falſi appelli predicti: Et ſi prædicta Helena ſit ſufficiens ad damna ſolvenda: Et ſuper hoc quæſitum eſt à præfatis Juratoribus quæ damna prædictus Laurentius & alij ſuſtinuerunt ſingulatim occaſione prædicta. Qui dicunt quod prædictus Laurentius ſuſtinuit damna ad valentiam 10 l. Et Richardus Cohorta ad valentiam 10 l. & Johannes Gilman 5 l. & Johanna uxor dicti Johannis Gilman 5 l. & ſic ſingulatim de cæteris: Quæſitum eſt ſi prædicta Helena ſit ſufficiens ad aliqua damna ſolvenda. Qui dicunt, quod non. Quæſitum, quis vel qui abbettavit vel abbettaverunt præfatam Helenam ad appellationem prædictam proſequendam. Qui dicunt, quod Johannes Riddel ſenior, Johannes Riddel junior, Tho. Drury & Alicia Allet abbettaverunt præfatam Helenam, ideo ipſi diſtringuntur ſecundum formam ſtatuti ad reſpondendum, &c. Out of which Record theſe things are to be obſerved.

1. Although it is enacted by the Statute of Weſt. 2. cap. 21. That in this caſe Juſticiarij, &c. puniant appellatorem per priſonam unius Anni, &c. and according to the Court committed to Priſon, &c. ſo that they were not bayleable, yet Quia eadem Helena prægnans fuit & in periculo mortis; She was let out upon Main-pr[illegible] to have her body, 15 Mich. ad ſatisfaciendum prædicto Laurentio & aliis de damnis ſingulatim adjudicatis occaſione prædicta: And the reaſon of this is, for this, that the common Law requires in every caſe conveniency; and it is inconvenient that a woman with Child ſhould remain in common Goal Sub Salva & arcta cuſtodia, where women cannot reſort to her upon times as neceſſity ſhall require forthwith for convenience, & principally where it is for avoiding the danger of death, the Court hath

hath power to put her Main-prise untill she be delivered; for it ought to be a truth concerning the Judges of the common Law, which the Moral Poet hath spoken, Reddere personæ scit convenientia cuique: And with it agrees that advice which Bracton gives to the Judges, lib. 2. cap. 2.

Considerent Judices efficaciter quid oportuerit secundum necessitatem, quid expedierit secundum utilitatem, quid ligatum fuit secundum permissionem, & quid deceat secundum honestatem,

2. That the Defendants recover their damages either wholly against the Principal, or wholly against the Abbettors, and not part against the one and part against the other; and that the Record is Quæsitum est, si prædicta Helena est sufficiens ad aliqua damna solvenda: And with this 'tis agreed in 8 Ed.4.3.

3. Although that the Statute saith, Restituant Appellatores damna appellatis, yet the damages shall be singulatim assessed: for that the words are further, Secundum discretionem Justiciariorum, habito respectu ad prisonam vel arestationem, &c. So that forasmuch as the causes of damages are several, as the defamation, &c. of the one may be greater than of the other, and the damages of the one may be greater than of the other.

4. That although that the Appellor be not sufficient for to pay, yet his body shall be taken ad satisfaciendum. Quia qui non habet in ære, luet in Corpore.

5. That although that Jurors in the appeal have found the Defendants Abbettors, yet insomuch as they are strangers to the Original, they shall not be concluded, for they shall be distrained ad respondendum: And to that they may plead not guilty, or other plea: Quia res inter alios actæ alteri nocere non debent.

Vide the Book of Entries, Title, Appeal divisione damages 1, & 2. And this doth appear also by the said Statute which sayes, that Si Abettor convictus sit de hujusmodi Abettat. per malitiam puniatur per prisonam & tenetur ad restitutionem damnorum faciendam.

Placita coram Rege apud Ebor. in Crastino Sancti Trin. An. 7 Ed. 3. 44. Divisione Indictment aer very worthy of observation; The effect of one Indictment was Quod ubi quidem Robertus de Bayons de Tunelby captus fuit & in prisona Castri London detentus pro quodam debito statuti mercatorij in Custodia Thomæ Botelier Constabularij Castri de London ubi ipse Thomas le Botelier posuit ipsum Robertum in profundo Gaolo, inter Lenones & vili prisona contra formam statuti, &c. viz. de 1 Ed. 3. Et eodem profundo detinuit quousque idem Robertus fecit finem cum eo de 40 s. quos ei solvit & hoc per exactionem.

Dures

Dureſs per Goalor.

ITem preſentant, That one Wellingoner was arreſted for Treſpas at the Suit of James Cantelupe, and detained in the ſaid Goal, the ſaid Thomas for forty ſhillings, Ad largum ire permiſit: Idem Wellingoner ire non potuit quouſque finem fecit cum Roberto de Barton Clerico de dimidio Marcæ quod ei ſolvit & ulterius pro ferris.

Item preſentant, That one John Aylmer of Digby purchaſed of Thomas Lord of Bardolfe one Meſſuage, &c. Ibi venit Magiſter Clericus Eſchetoris colore officij ſui, & abſque aliqua cauſa dictam terram ſeiſinit in manus Domini Regis, & noluit ipſum Johannem permittere terram ſuam prædictam quouſque Idem Johannes finem feciſſet cum prædicto Magiſtro Roberto pro 40 s. quos cepit per extortionem & nunc manum ſuam amovit.

Item preſentant, quod ubi Thomas Balivus Wapentachiæ de Flaxwel & Laughton, tenet Wapentachiam ſuam ſuper proclamationem, & illa proclamatio debet fieri ſolenniter in villa de Lasford & Kirkby, ſuper quam proclamationem homines Wapentachiæ poſſent pervenire ibi: Predictus Tho: non fecit Proclamationes ſuas, per quod homines patriæ amerciati ſunt graviter, & huiuſmodi amerciamenta de ijs levata fuerint, & hoc per extortionem: To which he appeared and pleaded not guilty, and was found guilty, and fined and impriſoned.

Item preſentant, quod Thomas de Maudon Balivus Wapentachiæ de Boby & Grafton. tenere debuiſſet 2. Wapentachia in diverſis locis ad acſiamentum patriæ prout de Jure deberet. Idem Thomas tenebat ambo Wappentachia in uno loco, ad maximum damnum populi Wapentachiæ prædictæ, & homines eorundem Wapentachiorum nimis exceſſive fuerint amerciati.

Item Thomas Carleton under Sheriff of the County of Lincoln, was indicted for this, that one Barthol. de Lotgrave purchaſed a Writ againſt Nicolas de Notthingham, and delivered the ſaid Writ to the ſaid Sheriff, who returned a Tarde upon the ſaid Writ, although the ſaid Writ was ſufficiently in time delivered: Et ſic fecit iterum, &c.

Item Hugo de Baxter Latro notorius indictatus de Felonia non fuit replegiabilis & quod malæ famæ extitit.

IN an Action ſur le Caſe, it was reſolved per totam Curiam, that if a Sumner return one certified upon his Oath in Court Chriſtian, where in truth he was not, and he is pronounced Contumax, and after he is excommunicated, he ſhall have an Action ſur le Caſe, for here is Injuria & damnum. And in ſuch caſe the Plaintiff ſhall have Judgment to recover, for although that the proceeding and Oath touching this matter are Eccleſiaſtical, yet the damage is temporal, for he is diſabled to ſue in any Court.

And it was reſolved, that Perjury, by which Damages do accrue, may be puniſhed as a miſdemeanor at the ſuit of the King.

And

And alſo the party may have his Action upon the Caſe to recover Damages, for it ſhould be a very great defect in the Law, and encouragement to the parties, if men may commit Perjury with impunity: And for that reaſon, if Jurors uſe Perjury themſelves, an Attaint lyeth at the Common Law, for ſo it appears by Glanvil, lib. 2. cap. 29. 15 H.8. title Attaint 75.6. H. 3. lib. 73. & 75. and in the time of Ed. 1. Attaint 70. for the firſt Act which gave the attaint; the Statute of Weſt. 1 cap. 38. vid. F.N.B. 109. vid. 27 H.6. 25. one who was to be a pledge affirmed upon his Oath, that he could diſpend forty ſhillings per annum, and upon re-examination he confeſſed it falſe, for which he was committed to the Fleet untill he made a Fine, which proves that the falſe Oath was the wrong and injury, and puniſhable by the Law, Et ex conſequenti, when Damages follow to the party, he ſhall have remedy by Action upon the caſe.

N.B. the confeſſion doth be recorded

In like manner it was agreed, that if one make a falſe Affidavit, by which the party is arreſted and moleſted by proceſs of contempt, he may have an action ſur le caſe, and recover damages. And although that when the matter is meer Eccleſiaſtical, the Court Chriſtian may puniſh Pro ſalute animæ, yet they cannot award any damages to the party, for if one within holy Order be beaten, they may proceed, againſt the Delinquent Pro ſalute animæ, but the Prieſt ought to recover his damages by action of Battery, So notwithſtanding that they may puniſh the ſaid Sumner in the caſe at the Bar, for Perjury and falſe certificate, yet the party grieved ſhall recover his Damages at the common Law: And although the matter be meerly Eccleſiaſtical, yet if the party grieved hath damages, either by any wrongful proceedings of the Judge, or Miſ-ſeaſans, or non-ſeaſans, or Falſity of any Miniſter, or by unjuſt proſecution of the party, the party grieved may have an action ſur le caſe, and recover his damages.

Doctor and Student 118, 119. Action ſur le caſe, lyeth againſt the Ordinary, for a wrongful excommunication touching any thing out of his Juriſdiction, ſo there many other good caſes: And the caſe in Fitz. 47. H.6.8. If an Arch deacon refuſe to induct the Clerk, &c. he ſhall have an action upon the caſe, which was affirmed for good Law by all the Court, with which agrees 26 H.8.3.a. and true it is, that it is held in 38 H. 6. 14. That in ſuch caſe he ſhall have remedy againſt the Arch deacon to puniſh him; but ſaving the opinion there, they cannot award him damages in ſuch caſe, but he ſhall recover them at common Law: So F.N.B. 92. If a man proceed againſt a Prohibition, the party may have an action upon the caſe againſt him for proſecuting in Court Chriſtian, vide Trin. 20. Ed. 3. Rot. 46. in the Treaſury: Richard Treſils Caſe, there he recovered Damages againſt the Biſhop of Norwich, by him excommunicated after Prohibition, Epiſcopus adjudicatur eſſe illicitum expugnatorem Authoritatis Regiæ, & querens recuperavit decem mille libras, ſimile Paſch. 13 Ed. 3. Rot. 78. Philip de Hardeſhals caſe, Hil. 32 Ed. 3. Rot. 78. Sir Tho. Seaton Knight, recovered againſt Lucy who was the Wife of Robert Cockſide for ſuing to Rome pro tranſgreſſione facta per ipſum Thomam, pro captione bonorum & catallorum ſuorum & pro debitis, & inde pronunciari fecit ſententiam excommunicationis, &c. he recovered by Verdict Damages to three thouſand pound, &c. Trin. 37 Ed. 1. Coſts were recovered againſt the Arch biſhop of Canterbury, forty pound pro damnis, per quod ipſum excommunicavit pro executione brevis Regis pro manu fortia amovenda. Ideo Epiſcopus capt. Mich. 29 Ed. 3. Rot. 19. ſimiliter: And divers other Records you may ſee in my Book of Preſidents.

Paſch.

Paſch. 14. Jac.

AN Habeas Corpus to the Marſhall of the Admiralty granted in Hill. Term laſt paſt, for Haukeridge, Priſoner in the cuſtody of the ſaid Marſhal, who did return, Quædam cauſa ſpolii, &c. contra Haukeridge pendet inde ſi pro judicio & ſententia paratus ſit, &c. Qui quidem Will. Haukeridge ſic commiſſus remanet, donec ante dicta Cauſa per præfatum Daniel Dun fuerit, Et hæc eſt cauſa. And alſo upon another Habeas Corpus, he made ſuch a return, and otherwiſe parata ſit, &c. which the Court took to be very inſufficient, and gave divers days to amend the return, and to ſhew the cauſe of delay, and for why ſentence was not given, foraſmuch as ſententia fuit parata, or otherwiſe a man may be in perpetual Priſon: And the Marſhal would not amend his return, upon which the party being in Priſon ſixteen or eighteen weeks, always the return was eſt parabeta, &c. ſo the cauſe was long Parata ad judicium, ſed nunquã judicata: And after in another Writ returnable Craſtino Aſcenſionis, was another return of Parata, &c. without ſhewing cauſe of delay: Alſo it ſeems the return was inſufficient for another cauſe, viz. Quædam cauſa ſpolii civilis & maritima quæ coram &c. which is too general for two cauſes.

1. For that [ſpolii] is uncertain, and ought to be ſpecified in ſome more certainty of what things, or of, or in what things in particular, and does not ſhew any value of the Goods.

2. That Maritima eſt ſuper littus, or in portu maris, for thoſe appertain or are next to the Sea, and yet the Admiral hath not Juriſdiction Super littus maris or in portu, for that they are Infra corpus Comitatus, as appears in many Books and Records. And ſo it was adjudged in Lacy's caſe, that Infra the high water mark, and low water mark, when the Sea is at an Ebb, it is within the body of the County, Dyer 15 Eliz. the Abbot of Ranſey's caſe, yet this is Maritima, 15 Eliz. Dyer, fol. 326. Paſch. 17 Eliz. in Scaccario ac contra Diggs, for which cauſe he ought to have ſaid, Super altum mare, infra juriſdictionem Admiralli; for the Statutes of 13 R. 2. cap. 5. 2 H. 4. cap. 11. 19 H. 6, 7. confine him only ſuper altum mare: And the Return which concerns the Impriſonment of the body ought to be certain.

But for the firſt, all the Court reſolved, that it was inſufficient: Alſo there was ſhewn no time of the ſpoil; and for this, in the ſame Term, for the inſufficiency of the Return which the Court could not obtain to be amended, the ſaid Haukeridge was bailed in open Court until the next Term: Alſo the words are, Quædam cauſa ſpolii ac civilis ac maritima, vid. 28 H. 8. cap. 15. that upon an inſufficient Return the party ought to be bailed or diſcharged, all our Books and infinite Preſidents are, vide 6 H. 6. 44. otherwiſe if the Return ſhall be ſufficient when it is falſe. And note the proceeding was Civiliter, for to have reſtitution, & non Criminaliter.

Note, that it was ſaid by ſome, that when Judgment is given, that one ſhall be hanged until he be dead; the King cannot alter the Judgment, and command that he ſhall be beheaded, for that the execution ought to be conform to the Judgment: and with this accords 35 H. 6. fol. 58. & Stamford lib. 1, fol. 13. vide 27 Aſſ. pl. 41. vide F. N. B. 144. where it ſeems that he may be beheaded, 22 Aſſ. pl. 49. One was beheaded for killing of Adam Walton, the Kings Meſſenger, which is there taken for petit Treaſon. But when one is attaint of Treaſon, his judgment is to be hanged by the neck, and cut down alive, and his Entrails and privy members cut

off from his body, and burnt in his ſight, his head to be cut off, his body to be divided into four parts, and diſpoſed of at the Kings will, ſo that in ſuch caſe the King may pardon all the execution, but Decapitation, for this is parcel of the Judgment; and the King may pardon all or any part at his pleaſure; And it was reſolved that the Duke of Somerſet, foraſmuch as his Judgment was to be hanged by the neck, could not be beheaded, for that would alter the Judgment. And ſo it was reſolved in the caſe of the Lord Sturton in the time of Quæn Mary, and of the Lord Dacres in the time of H.8, both which were hanged for Felony.

It was reſolved alſo, that King H.8. could not by the Law behead his Wives for Treaſon, for Judicandum eſt legibus, non exemplis.

And note, that when a Noble man is attaint of Treaſon, and hath this Judgment as is aforeſaid; the courſe is, that the King makes his Letters Patents directed to the Lord Chancellor of England, reciting the Attainder; yet we minding to diſpence with that manner of execution of Judgment, in reſpect that the ſaid A.B. is a Noble man, do therefore by theſe preſents remit and releaſe the ſaid A.B. of and from ſuch execution of Judgment, and inſtead thereof, our pleaſure is, to have the head of the ſaid A.B. cut off, &c. as in ſuch caſes hath been uſed, touching or concerning Noble men: And by the ſame do require the Lord Chancellor to make two Writs under the Great Seal, one to the Lieutenant to deliver the ſaid Priſoner, and the other to the Sheriff of London, to receive and execute the ſaid Priſoner, &c. And the caſe of the Lord Sanchez was ſtronger, for that he was not Noble within England.

Trin. 9. Jac. Regis.

IN this very Term, I moved the Juſtices in Serjeants-Inne in Fleet-ſtreet, upon the Statute An.7. Jac.cap.6. which gave power to two Juſtices of Peace, to require any perſon or perſons, &c. and in ſome caſes one Juſtice of Peace only, if the Juſtices of Peace may make a ſpecial Warrant to Conſtables, &c. to have the bodies of parties, who are to take the Oath according to the Statute before them. And it was reſolved by all una voce, that they may, and that for two reaſons:

1. When the Statute gave power to Juſtices of Peace to require any perſon or perſons, &c. to take the Oath, the Law implicitè gave them power to make a Warrant to have the body before them, for Quando lex aliquid alicui concedit, conceditur & id ſine quo res ipſa eſſe non poteſt.

2. It is againſt the Offices of the Juſtices, and of the authority given them by the Statute, that they ſhall go and ſeek the parties: And principally in a caſe of ſo great conſequence. Then I moved, if in ſuch caſe the Conſtables may break the houſes of the parties named in their Warrants: And it ſeemed to us all that they cannot, for that they are not any Offenders until they refuſe to take the Oath before them who have authority to tender it to them, or commit ſome contempt to the King; And inſomuch as they are not yet Offenders, nor are indicted nor charged by any matter of Record, their houſes cannot be broken by Warrant made by conſtruction upon the Statute, by which authority is given, &c. to require them to take the Oath, vid. Statute 7 Jac. and ſee in it, that Baron and Baronneſſes, as to the tender of the Oath, need not to be indicted, &c.

for

for theſe words, Of or above the ſaid age or degree, are to be intended of the ſaid age, and above the ſaid degree, or otherwiſe the firſt clauſe concerning Barons ſhould be idle, vide thoſe who have power to tender the Oath to them of the Nobility, have power to commit them upon refuſal to the Common Goal, by the general Act; and if any perſon or perſons being of the age of eighteen years, or above, ſhall refuſe to take the ſaid Oath duly tendred, &c. which clauſe extends to all before.

Note, if the perſon be fugitive in another County, he evades the Statute for the preſent; but he may be indicted for recuſancy, and the Indictment may be removed into the Kings Bench, and they may make proceſs againſt them in any County of England: Alſo if they are in their houſes the door being ſhut, &c. then they may be indicted either before the Juſtices of Aſſize, or before the Juſtices of Peace at the quarter Seſſions, and then after a Venire facias, &c. by force of a Capias, their houſes may be broken by the Sheriff, vide Statute 10 Eliz. cap. 2. (to which the Statute of 23 Eliz. refers, &c.) ſuch proceſs is given in caſe of not repairing to Church, &c. as in Indictment of Treſpaſs which is Ven. fac. cap. &c.

Memorandum Hill. Term 9 Jac. all the Juſtices of England by commandment of the King, ſignified by the Lord Chancellor, were aſſembled to have conſideration of theſe two Statutes. And in the beginning of this Term, the ſaid points were recited and debated, and after good conſideration ſeverally, and conference had altogether: It was reſolved by all, That if one be indicted for recuſancy, the Court may proceed by proceſs upon the Statute of 23 Eliz. or by Proclamation according to the Statute of 28 Eliz. And that the proceſs upon the Indictment for Recuſancy, and Ven. fac. Capias, &c. which is the proceſs in Indictment of Treſpaſs; and upon the Cap. the Sheriff upon requeſt firſt made to open the Door, according to the reſolution in Seyman's Caſe, and when the Sheriff brought him into Court, he may upon refuſal of taking his Oath be generally indicted as before Juſtices of Aſſize, or in open Seſſion of the Peace upon refuſal before them: But the Juſtices upon the ſecond day of conference, did not ſpeak to the other point. And after this reſolution was reported to the Lords of the privy Council at Whitehall, in the preſence of all the Juſtices of England, the ſeventh day of Feb. in Termin. ſancti Hill. 9 Regis, and the Lord Chancellor deſired that we ſhould put our reſolutions in writing; To which I anſwered, that the Judges never uſed to put their reſolutions in writing, but that if the Attorney or Solicitor come to us (as the ancient uſe hath been to our Predeceſſors) we will deliver our opinions to them again Ore tenus, but not in writing.

At the third day of the conference in this very Term, it ſeemed upon the Statute 3 Jac. if Juſtices of Peace upon refuſal before them, commit any perſon to Goal without Bail or Mainprize, and mention in their Warrant the tender and refuſal, then the Juſtices of Aſſizes, or Juſtices of Peace ought to tender the Oath again, and to have a ſpecial Indictment; for the words of the Act 3 Jac. are, And if the ſaid perſon or perſons, or any other whatſoever, &c. ſo that this word [other] excludes the perſons, who were committed for refuſal. But it ſeems if the Mittimus of the Juſtices of Peace, &c. do not comprehend any tender and refuſal of the Oath, then they may be generally indicted, as upon refuſal in open Court, for the Court cannot take notice of tender and refuſal in ſuch caſe: And it was reſolved, that the Major number of the Juſtices of Peace who commit the parties, have election to commit either to the next Aſſizes, or the next Seſſions; for the words of the Statute being in the Diſ- Juſt. P. pour commit.

junctive, ſome may be more apt to be committed until the next Aſſizes, and ſome until the next Seſſions: And it is to be obſerved, that two Juſtices, of which the one is to be of the Quorum, by the Statute 7 Jac. may commit any perſon above the age of eighteen, and under the degree of Nobility, although that he be not indicted, nor convict, &c. But a Juſtice of Peace cannot commit any unleſs they be proſecuted, indicted, or convicted, &c. according to the Statute 7 Jac. And it was reſolved by all, That if the Indictment be commenced upon the Statute 3 Jac. upon refuſal in open Court, the Indictment may be ſhort and general, of what the parties are indicted, &c. And not ſo if the Indictment be upon the Commitment made by two Juſtices of Peace; this is good of any perſon whatſoever, but in ſuch caſe if the Mittimus be eſpecial, comprehending the tender of the Oath and Refuſal, there ought to be a ſpecial Indictment and refuſal in open Court. Alſo if the Juſtice of Peace make a ſpecial Mittimus, then the Indictment ought to be ſpecial, ſcil. to recite that the party was indicted or preſented, &c. in certain, according to the Statute of 7 Jac. And that he refuſed before one Juſtice of Peace, or otherwiſe in open Court; but if the Mittimus be general, as is aforeſaid, then the Indictment before Juſtices of Aſſize at the Aſſizes, or Juſtices of Peace at the Seſſions of Peace, may be general upon the Statute of 3 Jac.

Mich. 10. Jacobi Regis.

The Earl of Northampton's Caſe.

THe Attorney-general informed againſt Thomas Gooderick Gent. Sir Richard Cox Knight, Henry Vernon Gent. Henry Minors Serjeant of the Waggons, Thomas Lake Gent. and James Ingrum Merchant, Ore tenus in the Star-Chamber, the laſt day of the Star-Chamber, and charged Gooderick that he had ſpoken and publiſhed of the Earl of Northampton, one of the Grandees and Peers of the Realm, one of the Kings priby Council, Lord priby Seal, and Lord Guardian of the Cinque-ports, divers falſe and horrible Scandals, ſcil. That more Jeſuites, Papiſts, &c. have come into England, ſince the Earl of Northampton was Guardian of the Cinque-ports than before.

Nec paratus nec neceſſarius qui ſit de portu

2. That the ſaid Earl had writ a Book openly againſt Garnet, &c. but ſecretly he had writ a Letter to Bellarmine, intimating that he writ the ſaid Book Ad placandum Regem, ſive ad faciendum populum, and requeſted that his Book might not be anſwered; and that the Archbiſhop of Canterbury had certified it to the King, and that the ſaid Gooderick did relate it to one Dewsbury, a Batchelor in Divinity, who had acquainted the ſaid Earl with it. Gooderick being examined, confeſſed the words ſpoken; but to extenuate his offence ſaid, that he was not the firſt Founder: And he vouched the ſaid Sir Richard Cox, who confeſſed that he related to Gooderick the matter concerning the book of the Earl, and his Letter to Bellarmine, but not the words concerning the Cinque-ports: And that the Archbiſhop of Canterbury had informed the King of it, to the intent that the Earl of Northampton ſhould not be Lord Treaſurer; and to extenuate

ate his Offence, he vouched the ſaid Vernon, who upon examination confeſſed that which Richard Cox had publiſhed, but that he was not the firſt Author, but he cited the ſaid Lake, who did likewiſe confeſs what Vernon had ſaid, but that he heard it from Serjeant Nichols, who being examined confeſſed it. And withal, that one Speaker related it to him, and that he had heard it from one James Ingrum, and James Ingrum being examined confeſſed the words concerning the ſaid book of the Earl, and of the Letter to Bellarmine: And that in the month of October, he heard the ſaid words of two Engliſh Fugitives at Ligorne, and never did publiſh them until the death of the Earl of Salisbury, Treaſurer, who died in May laſt: And all the ſaid Defendants confeſſed at the Bar, all that with which they were charged. And at the hearing of this Caſe were eleven Judges of Law, Fleming Juſtice being abſent Propter ægritudinem.

And ſo it was reſolved, that the publiſhing of falſe rumors, either concerning the King, or of the high Grandees of the Realm, was in ſome caſes puniſhable by the Common Law: but of this were divers opinions.

1. Touching the matter and quality of the words.
2. Touching the perſons of whom they are ſpoke.
3. The manner of contrivance, or publiſhing of them.
4. Touching the puniſhment, for which cauſe divers Acts have made declaration, and have put things in certainty.

And firſt of all, as to the words or rumors themſelves.

1. They ought to be falſe and horrible.

2. Of which, diſcord or ſlander may ariſe betwixt the King and his people, or the Grandees of the Realm, Weſt. 2. cap. 24. or between the Lords and Commons, 2 R. 2. cap. 53. by which great peril and miſchief may come to all the Realm, ibidem.

The ſubverſion and deſtruction of the Realm, ibidem. And for this the ſaid Act of 2 R. 2. againſt rumors, falſe and horrible Meſſages.

2. As to perſons, they are declared to be Prelates, Dukes, Earls, Barons, and other Nobles and Grandees of the Realm, and alſo of the Chancellor, Treaſurer, Clerk of the privy Seal, Steward of the houſhold of our Sovereign Lord the King, Juſtice of the one Bench, and of the other, or of any the great Officers of the Realm, ut 2 R. 2. cap. 5. and the King is contained within the Act of Weſt. 1. cap. 34. as appears in Dyer 5. Mar. 155.

3. As to the third point it was reſolved, that if one hear ſuch falſe and horrible rumors either of the King, or of any of the ſaid Grandees, it is not lawful for him to relate to others, that he hath heard J. S. to ſay ſuch falſe and horrible words; for if it ſhould be lawful, by this means they may be publiſhed generally, &c. And this doth appear by the ſaid Statute, viz. That the party ſhall be impriſoned until he find out the party who ſpoke them, which proves that it was an offence, or otherwiſe he ſhould not be puniſhed for it by Fine (for this is implied) and Impriſonment.

It was alſo reſolved, that the Offenders at the Bar, if againſt them the proceedings had been by Indictment upon theſe Statutes, no Judgment could be had againſt them, that they ſhould be impriſoned until they found their Author: For, for example, Gooderick did not relate to Dewſbury that he heard from Sir Richard Cox, but he related the ſame words as

as of himſelf: And for this no Judgment can be given againſt him, that he ſhall be impriſoned until he find his Author: for this, that he ought to be indicted for the words which he himſelf did ſpeak, and then, De non apparentibus & non exiſtentibus eadem eſt ratio, When the Indictment is general without any relation to a certain Author, the Judgment, which alwaies ought to be given of matter apparent within the Record, cannot be that he ſhall be impriſoned, until he hath found his Author.

And it was reſolved, that if A. ſay to be B. Did you not hear that C. is guilty of Treaſon, &c. this is tantamount to a ſcandalous publication: And in a private Action for ſlander of a common perſon, if J. S. publiſh that he hath heard J. N. ſay, that I. G. was a Traytor or Thief; in an Action of the Caſe, if the truth be ſuch, he may juſtifie: But if I. S. publiſh,

That he hath heard generally without a certain Author, that I. G. was a Traytor or Thief, there an Action ſur le Caſe lieth againſt I. S. for this, that he hath not given to the party aggrieved any cauſe of Action againſt any, but againſt himſelf who publiſhed the words, although that in truth he might hear them, for otherwiſe this might tend to a great ſlander of an Innocent, for if one who hath Læſam Phantaſiam, or who is a Drunkard, or of no eſtimation, ſpeak ſcandalous words, if it ſhould be lawful for a man of credit to report them generally, that he hath heard ſcandalous words, without mentioning of his Author, that would give greater colour and probability that the words were true in reſpect of the credit of the Reporter, than if the Author himſelf ſhould be mentioned, for the reputation and good name of every man is dear and precious to him: And a Record was vouched in Mich. 33 & 34 Ed. and in the 30 Aſſ. pl. 10. and in the Exchequer, Mich. 18 Ed. 1. Rot. 4.

Note, that all the Commiſſions of Oyer and Terminer give authority to enquire De illicitis verborum placitationibus, vide le Stat. 5 R. 2. cap. 6. & 17 R. 2. cap. 8. concerning Rumors, and in 3 Ed. 2. in the Exchequer, Henry Bray ſpoke of John Foxley Baron of the Exchequer: It was reſolved, that the Judgment in an Indictment upon the ſaid Statutes, when the words are ſpoken generally, without relation to a certain Author, is, that the Offender ſhall be fined and impriſoned, for this is implied and included in the ſaid Statutes, as an incident to the Offence, although that it is not expreſſed. Alſo the party grieved may have an Action de ſcandalo Magnatum, and recover his dammages. Alſo the party grieved and the Kings Attorney, if the Offenders deny it, may exhibit a Bill in the Star-Chamber againſt the Offender, in which the King ſhall have a Fine, and the party ſhall be impriſoned, and the Court of Star-Chamber may inflict corporal puniſhment, as to ſtand upon the Pillory, and to have papers about his head.

And if the Offenders confeſs it, then to proceed Ore tenus upon their own confeſſion; and for the publication of the ſaid words, all the Defendants were puniſhed by all the preſence, una voce nullo contradicente by Fines and Impriſonment: And Gooderick and Ingrum were fined the moſt, for that Gooderick had no Author for the words concerning the Cinque Ports, nor could Ingrum find any Author for to vouch, that he heard by perſons unknown at Ligorne in forraign parts; and therefore it was taken as a fiction of his own.

Trin.

Trin. 10. Jac.

Eſtwick's Caſe in Curia Wardorum.

KIng Philip and Queen Mary by their Letters Patents, De gratia ſpeciali & ex certa ſcientia & mero motu, &c. granted to Aringal Wade in Fee, the Farm or Grange called Milton Grange in Com. Bedford, parcel of the poſſeſſions of the late diſſolved Monaſtery of Wooborne, tenendum prædictam firmam ſive Grangium de nobis & ſucceſſoribus noſtris, ut de Manerio noſtro de East Greenwick in Com. Kantiæ in capite per ſervitium viceſimæ partis unius Feodi militis pro omnibus redditibus, ſervitiis, exactionibus, & demandis quibuſcunque, which Grange by mean conveyance came to Chriſtopher Eaſtwick, after whoſe death the Tenure was found verbatim, according to the words of the Patent. And the queſtion was, if the Tenure was by a Mean, as of the ſaid Honour, or in Capite: And their principal reaſon was, that the Letters Patents of the King ſhall be conſtrued according to the Kings intention expreſſed in his Charter. And in this caſe of neceſſity ſome words ought to be rejected, ſcil. theſe words (in capite) and then the ſenſe will be, Tenendum de nobis, &c. ut de Manerio noſtro de East Greenwick in Com. Kantiæ per ſervitium viceſimæ partis unius feodi militis, &c. or theſe words, De Manerio noſtro de East Greenwick in Com. Kantiæ, and then the ſenſe will be, Tenendum de nobis, &c. in capite per viceſimam partem unius Feodi militis, &c. for both together cannot ſtand; and then the better ſhall be taken for the King, as in 5 Mariæ, Dyer 162. Tenure of the King, Per ſervitium militare, is to be intended Tenure in Capite. So Tenure de quo vel quibus & per quæ ſervitia ignorant. is Tenure in Capite, for the beſt ſhall be taken for the King, 15 vide H.7. 7. 14 Ed.4.5. & 3 H.7.12. 9 H.7.9. 6, per Huſſey 13 H.7.4. per Fineax. 19 H.8. title Office Brook 58 Action.

Another reaſon was added, that if theſe words, in Capite, ſhall be rejected, then the words enſuing, ſcil. per ſervitium viceſimæ partis unius Feodi militis, &c. ſhall be rejected here; and then the tenure will be by one entire Fee of a Knight, for words in the middle of a Sentence may be extracted: and as well the conſequent as the precedent ſtand: But it was anſwered and reſolved, that the ſaid Grange was held of the King as of the Honour, and not in Capite. And the reaſon was for this, that Tenure of the King in Capite is as much as to ſay, Tenure in groſs, or of the perſon of the King: And for this, that the chief and principal part of the body of the Tenure of the perſon of the King is ſaid in Capite. And it appears by ancient Records, that in ancient time all Tenures in Groſs, or of the perſon of a Subject called Tenures in Capite: as in Clauſe 9 H.3. member 28. Robertus filius Madock tenuit terram de Thoma Corbet in Capite: And in the ſame manner you ſhall find by many other Records, Lands to be held of Subjects in Capite, which we call Tenure of the perſon or in Groſs, but of late time, Dicitur de Rege ſolummodo, terras teneri in Capite. Then it is as much as to ſay, Tenendum de nobis, &c. ut de Manerio noſtro de East Greenwich in Groſſe, ut de perſona noſtra, which is againſt the nature of a Tenure in Groſs, or of the perſon, when the Land is expreſly limitted to be holden of a Manor, &c. And for this, if the ſaid words ſhould be tranſported, ſcil. Tenendum de nobis in Capite ut de Manerio noſtro de East Greenwich, &c. this will not alter the Caſe, for when in the beginning or end, the Law is expreſly limitted to be held Ut de Manerio, the

the Tenure of the perſon is abundant, or it may have this ſenſe, that the King is Caput totius Regni: And for this, inaſmuch as it is limited to hold of the King, who is chief, it may be vulgarly ſaid, that the Tenure is in chief, inaſmuch as it is of the King as of a Mannor.

And as to the ſecond Objection, it was reſolved, That the abundant words ſhall be extended in Conſtruction of the Law, and not the words ſubſequent, which doth limit the Term in certainty: And with this reſolution in the principal point agræs Mich. 17, & 18 Eliz. 345. where it was found that Owen ap David was ſeized of certain Lands in Fæ held of the Quæn, as of the Principality of Wales in Cap. And it was held Per concilium Curiæ, no Tenure in Capite; and ſo (as it was ſaid) it was reſolved in the time of H.8. in Baron Luke's Caſe, where Lands were granted by the King to hold of him as of the Honour of Huntington, in Capite, that this was a mean Tenure, and not in Capite.

Nota, That a Tenure of any ancient Honours, as of Rawleigh, Hagent, and Peverell, are by uſage, and allowance in all ages taken for to have the effect of a Tenure in Capite, ſcil. To have all the Lands in Guard, &c. Et non valet ratio contra experimentum, vide le Stat. de Magna Charta, cap. 31. and the 11 H.7. in Rot. Parliamenti not printed, and 1 H.6. cap. 4. vide Bracton, lib. 2. fol. 87. 30 H.8. Dyer 8. 58. 29 H.8. Brook, title Livery 28, 57. 5 Ed. 3. 5.

THE

A TABLE OF THE PRINCIPAL MATTERS Contained in this BOOK

A

APpropriations of ancient time, now not queſtionable. *fol.* 4
Appropriations not void becauſe of an Eſtate tail in the Patron Grantor, *&c.* 4,5,6
Aurum Regis, the Kings Right in it, with *Cooks* limitations. 21,22
Admiralty, its Juriſdiction. 79,80
Its Original. *ib.*
Acceſſories, where, and where not. 81
Account in Common Pleas, Admiralty claims the Juriſdiction; becauſe of goods beyond the Seas. 104
Armor and *Pennons* hangd in a Church upon ſolemnities of Burial, who hath the property. 105
Abſentees, 28 H.8. Ireland. 108
Appeal of robbery, the Appellant committed. 125,126
Action of Caſe lyeth againſt a Sumner for a falſe return. 128

B

BIſhops after the firſt Seſſion of the Parliament not lawful Biſhops. 7
Biſhoprick, two united. 71
Blind man Sealing a Deed, not good where. 89
Benevolence, when it began, and how lawful 119 upon what occaſions allowed of. *ib.*
Buggary, expoſition of the Statute of 25 H.8. cap. 6. concerning it. 36,37

C

CEſtuy que uſe, what he ſhould have forfeited in Treaſon. *fol.* 1
Covin, what ſhall be ſaid ſo. 2
Ceſtuy que uſe, nec habet jus in re nec jus ad rem. 2
Cuſtoms *del Roy*. 17,18,19.
Conſpiracy lies not againſt a Juror or Indictor, but againſt a Witneſs. 23,24,25.
Commiſſions in Engliſh againſt Law, other reaſons why. 30,31
Cuſtoms, Subſidies, and Impoſitions, the Kings power in them, where and where not. 32,33
Conſultation, when grantable, when not. 41,42
Convocation, its power, and how limited. 26

Chancellor in Court Christian, his power. 78
Court of Wards. 86
Conspiracy where it lies. 90,91
Contempt in refusing to be examined 93, argued 94,95, punished. 96
Capias utlegatum by Justice of Peace awarded, where it may be. 102
Common Pleas jurisdiction. 108
County Palatine. 113
Conviction of a Felon forfeits his Goods. 121
Confederacy punished in the Star-Chamber 121

D

Dignity and Prerogative 112
Duresse by a Goaler presented, the punishment. 127,128

E.

Endowment is presumed, when a Vicarage hath long continued. 4
Ecclesiastical Law, where, and where not allowable. 38,39,40
Of what it hath Cognizance, of what not, and reasons. 42,43
Ecclesiastical Jurisdiction. 111
Equity, Causes cannot be determined by Commission. 113

F.

Forfeiture in Treasons. 6
Forrests and Chases, what, and what not. 22
Firstfruits, what, when granted, and to whom they belong. 44
Ferry-man, an Action against him for things lost. 62
Felony after Attainder not to be answered unto. 100
Felony for stealing a Winding sheet. 113
Fine levied by a Fool, what it operates. 123,124
Fine by Feme covert under age 124,125

G.

Goods, whether it include Debts and Choses en action. 1
Grant le Roy void for incertainty. 85

H.

High Commissioners, what power they have. 19,20,21,49, 50,51,52,53,54,55
Habeas Corpus when allowable, when not. 45,46,69,70
Habeas Corpus returnable and discharged by Judgment of the Court 47
Heresie, the power Ecclesiastical and temporal in it, what is Heresie, how to be punished, 56,57
Hugh and Cry, exposition of the Sratute of *Winton.* 61
Habeas Corpus returned, 82. discussed. 83
High Commissioners, their proceedings examined. 84,85
High Commissioners, not Warrantable, whereforre. 87,88,89
Hæretico comburendo, where it lyeth 92.
Honours and Hereditaments explained. 107
Habeas Corpus to the Marshal of the Admiralty. 129

I.

Iustice of Wales cannot be by Commission but Patent, why. 48
Interest common cannot be drawn *ad aliud examen* than the Common Law alloweth. 68
Information, *sur le Stat.* 2. H. 6 cap. 15 concerning Fishing. 88
Indictment *sur le Stat*, 11 H. 4. *cap.* 9. 98
Inquisition upon *Diem clausit extremum.* 101

Judges

Judges divided in the Star-chamber, how the matter ſhall be taken. 117
Information in the Star-chamber *ore tenus* by the Attorney general, againſt perſons who had ſpoke ſcandalouſly againſt a Peer, 132,133

K.

KIng cannot diſhcharge an Offender, why, and in what caſes. 29, 30
King may ordain a new name of dignity not before. 81
King, the word extends to Succeſſors 109,110
It extends to Queen. *ib.*

L

LIbels, what they are; and where puniſhable. 85
Libel for Seats in the Church. 104
London, Cuſtomes there. 112

M.

MAnſlaughter. 87

O.

OUtlawed perſon, what he ſhall forfeit. 2
Ordinary cannot enforce a man to anſwer general Articles *ex officio.* 26,27
Office newly erected void, where. 116,117
Oath for Recuſants, by the Statute of 7 *Jac. cap.* 6.
The power of Juſtice of Peace, Juſtice of Aſſizes, Conſtable, in ſerving Warrants. 130,131,132

P.

PAtentee, what he ſhall have by the grant of Goods. 1
Penal Statutes not extendible by equity. 3
Prerogative of the King to make good debts.
Preemption of Tinn in Cornwal, Its original and Reaſon 9,10,11
Prerogative of the King in Salt-Peter, and where limited by *Cook.* 12,13,14
Pope, his pretence to power in England. 28·29
Præmunire by Statute and Common Law. 37,38,39,40
Prohibition, where it lieth. 58,59, 63,64,65,66,67,68
Parliament Writ of Summons doth not make a Peer. 70,80
Proclamation cannot make that an offence which was not. 74,75
Prohibition, none after a Writ of *Excommunicato Capiendo*, 76
Nor after a Sentence to the Admiralty 77
Principals, where all the Offenders are ſo. 81,82
Priveledge of Prieſts. 99
Perjury. 101
Parliament in *Ireland*, *Poynings* Law, 10 H. 7. explained 108,109,110
Proceedings in Parliament. 114

Q.

Quare impedit ſtayed by Ayd Prayer. 3

R.

REecognizance taken by a Recuſant in anothers name, twixt *Stat.* 23 *Eliz.* and 28 *Eliz.* how it appears. 1,2
Recuſancy forfeiture *per menſem.* 1
Recuſant convict, what he forfeits. 2
Reſervation, whether good to the Heir or not, where and why. 35,36
Regiſter in Court Chriſtian, his authority. 78

S.

S.

SUmmons, Citation, and Proceſs in the Eccleſiaſtical Court ſhall be made in the name and Style of the King. 7,8,9

Salt peter, what the Kings Miniſters may do in digging for it, and where. 12,13 14

Salt-peter, Licenſe to take it, when it begun, and upon what occaſion. *ib.*

Simony, what. 73

Star-chamber, its juriſdiction 83,89

Stray, who ſhall have it, and when. 100

Simony upon the Statute 31 H. 8. *cap.* 9. 100

Star-chamber, Bill for forgery. 103

Statutes in England where of force in *Ireland.* 111

Scandal of a Peer, examined in the Star-chamber. 132,133,134,

T.

TReaſon, for counterfeiting the great Seal, where and when. 15 16, 17

Trayle Baſton Juſtices, why ſo called. 25

Tithes what power the Eccleſiaſtical Judges have in expoſition of the Statutes. 65

W.

WOmen, the *Stat.* of 3 H. 7. *cap.* 14. expounded. 20, 99

Weſtminſter Hall: ſtabd, *Jedente Curia*, offence and puniſhment. 71

FINIS